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No. _____

IN THE

Supreme Court of the United States

CHARLESTON COUNTY, SOUTH CAROLINA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, prohibits laws that "result[] in a denial or abridgement" of the right to vote "on account of race or color." The United States brought suit alleging that petitioners' election of County Council members at large violated Section 2.

Under *Thornburg v. Gingles*, 478 U.S. 30 (1986), a Section 2 plaintiff must initially prove, *inter alia*, that candidates preferred by minority voters usually lose as the result of bloc voting by whites. To satisfy *Gingles*, the United States offered evidence that blacks and whites favored different candidates and that candidates preferred by blacks usually lost. The County countered with evidence that differences in black and white voting behavior were not "on account of race or color," as the statute requires, but rather on account of partisan differences between blacks (who prefer Democrats) and whites (who favor Republicans).

Consistent with Fourth Circuit precedent, but in conflict with other Circuits, the District Court refused to consider the County's evidence in determining whether the United States had satisfied its burden under *Gingles*. The court held that such evidence is relevant only in deciding the ultimate issue under Section 2, whether, under the "totality of circumstances," the United States had proved that blacks have less opportunity than others to participate in the political process and elect candidates of their choice. 42 U.S.C. § 1973. The District Court further stated that it would only be the unusual case in which a plaintiff that had

met its burden of proof under *Gingles* would not also satisfy the "totality of circumstances" test. The Court of Appeals affirmed. The question presented is whether the Court of Appeals should have required Plaintiffs to negate the evidence of partisanship in order to prove the existence of white bloc voting under *Gingles*.

LIST OF ALL PARTIES

The parties to the proceeding below are as follows: the United States of America; Lee H. Moultrie; George Freeman; Maggie McGill; Sandra Fowler; Charleston County, South Carolina; the Charleston County Council; Curtis E. Bostic, John O. Conlon, Toi Ahrens Estes, Cindy M. Floyd, A. D. Jordan, Barrett S. Lawrimore, Timothy E. Scott, Leon E. Stavrinakis, and Charles Wallace, as members of the Charleston County Council; and the Charleston County Election Commission.

CORPORATE DISCLOSURE STATEMENT

No party to this proceeding is a corporation. *See* Sup. Ct. R. 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Charleston County, South Carolina, *et al.*, (collectively, "Charleston County") petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, which held that Charleston County's at-large election of County Council members dilutes minority voting strength, in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

OPINIONS BELOW

The Fourth Circuit's opinion affirming the District Court's ruling is reported at *United States v. Charleston County*, 365 F.3d 341 (4th Cir. 2004), and is reproduced below at Appendix ("App.") 1a. The District Court's opinion on the merits is reported at *United States v. Charleston County*, 316 F. Supp. 2d 268 (D.S.C. 2003), and is reproduced below at App. 24a. The District Court's opinion adopting the Magistrate's report and granting the United States' motion for partial summary judgment is reported at *United States v. Charleston County*, --- F. Supp. 2d ---, 2004 WL 1149356, Nos. 2:01-0155-11, 2:01-562-11 (D.S.C. July 10, 2002), and is reproduced below at App. 103a. The Magistrate's April 26, 2002 report recommending that the court grant the United States' motion for partial summary judgment on the *Gingles* preconditions is appended to the District Court's summary judgment opinion at App. 122a. The Fourth Circuit's judgment is reproduced below at App. 155a.

JURISDICTION

The judgment of the Fourth Circuit was issued on April 29, 2004. This petition for a writ of certiorari is being brought to this Court within ninety (90) days of the judgment

below, as required by Sup. Ct. R. 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

This petition involves Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, which provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

A. Charleston County's Method of Electing Its County Council

Charleston County is located along the Atlantic coast of South Carolina. Its county seat and largest city is Charleston. Charleston County is governed by a nine-member County Council, whose members are elected at large in partisan elections for four-year, staggered terms. *See* App. 4a. Although County Council members are elected at large, they must live in one of four "residency districts." *See id.* The at-large electoral system was enacted in 1969 after being pre-cleared that year under §5 of the Voting Rights Act, 42 U.S.C. § 1973c. *See Woods v. Hamilton*, 473 F. Supp. 641, 643 (D.S.C. 1979). As of the most recent census, blacks comprise approximately 34% of Charleston County's overall population, 30% of its voting age population, and 31% of its registered voters.

B. The Growth of the Republican Party In Charleston County During the 1980s and 1990s

Prior to 1980, the Democratic Party controlled the Charleston County Council, as well as politics throughout South Carolina. *See* App. 168a-169a, 187a-190a. Democratic candidates relied on a combination of white support and heavy black support to win office. In 1970, the year after Charleston County adopted its at-large voting system, Democrat Lonnie Hamilton became the first black elected to the County Council. *See* App. 187a. Hamilton was re-elected five times, serving a total of 24 years, and twice served as chairman of the County Council, once by popular election. *See* App. 187a-191a. Elected in 1974 and

1978, Democrat Marjorie Amos became the second black to serve on the County Council. *See* App. 188a-189a.

In 1980, however, the Democrats' complete domination of the County Council came to an end. Riding the coattails of Ronald Reagan's presidential election, Republicans won all four elections for County Council seats held that year, leaving the Democrats with only a slim five-to-four majority. *See* App. 190a. Republicans won campaigning on themes that resounded with the voters, including lower taxes, reduced size of government, and overall fiscal conservatism. *See* App. 215a-216a.[1] County Council elections in subsequent years resulted in additional Republican victories, culminating with the complete Republican control of the County Council after the elections of 1994. *See* App. 191a-192a.

The emergence of the Republican Party coincided with a shift in support toward black Republican candidates and away from black Democratic candidates. Since 1995, a black Republican, Tim Scott, has repeatedly been elected to the County Council with strong white support. *See* App.

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[1] The Republican Party emerged as a dominant force not only in Charleston County, but also statewide. *See* App. 175a-202a. Although Democrats had dominated gubernatorial elections dating back to Reconstruction, South Carolinians elected Republican governors in three of the last four elections. *See* App. 176a-180a. Before 1980, Republicans held only a very small number of seats in the South Carolina General Assembly. However, the next twenty years saw substantial Republican gains, and by 2000, Republicans had majorities in both houses of the General Assembly. *See* App. 184a-193a. Like the County Council, the members of General Assembly during this period included several Republicans who had switched from the Democratic Party. *See* App. 187a, 193a. Additionally, over the past thirty years, South Carolinians have generally favored Republican presidential candidates. *See* App. 175a-177a.

191a-193a. However, since 1995, no black Democrat has been elected to the County Council. *See id.*

Though blacks have continued to support Democratic candidates, those candidates have lost because of the popularity of Republicans at the polls. For example, prior to 1990, Charles Wallace and Charles Lybrand both ran for the County Council as Democrats, receiving strong black support. Lybrand lost and both candidates felt the need to run as Republicans in the 1990 County Council election. *See* App. 189a-191a, 194a-195a, 218a, 221a-222a, 229a-230a. This time, black voters opposed them. Because of the popularity of Republican candidates, however, both Wallace and Lybrand won election to the County Council. *See id.*

Further evidence of the loyalty of blacks to the Democratic Party and the dominance of County politics by Republicans can be seen in the election of Tim Scott to the County Council. Scott, a black Republican, has won election since 1995, even though he was opposed by the black community. *See* App. 191a-193a.

By contrast, in Charleston County School Board elections, which are non-partisan, black candidates have continued to succeed. Indeed, a majority of the School Board is black. *See* App. 206a.

C. The Present Litigation Challenging Charleston County's At-Large Method of Electing County Council Members

On January 17, 2001, the United States brought suit against Charleston County, the Charleston County Election Commission, the Charleston County Council, and its nine members, alleging that the at-large election of the County Council diluted black voting strength in violation of Section

2. *See* App. 28a-29a. [2] On February 28, 2001, four private plaintiffs, Lee H. Moultrie, George Freeman, Maggie McGill, and Sandra Fowler, also brought suit, alleging that the County's at-large voting system violated Section 2 and the Equal Protection Clause. *See id.* On April 6, 2001, the cases were consolidated. *See id.*

After discovery, the United States moved for partial summary judgment, arguing that the evidence demonstrated, in accordance with *Gingles*, the necessary preconditions for Section 2 liability: (1) that the black community in Charleston County is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the black community is politically cohesive; and (3) that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *See* 478 U.S. at 50-51.

The County cross-moved for summary judgment. The County did not dispute the existence of the first and second preconditions (the possibility of drawing a single-member district with a compact black majority and the existence of cohesive voting by black voters). The County argued, however, that it was entitled to summary judgment on the third *Gingles* precondition (the existence of white bloc voting). In support of this argument, the County pointed to undisputed evidence that the differences in black and white voting behavior resulted not "on account of race," as the statute requires, 42 U.S.C. § 1973, but rather as a result of partisan differences.

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[2] The complaint was amended on January 23, 2001, essentially to allege changes in the membership of the County Council.

The County further argued that even if the United States had proved all three *Gingles* preconditions, the County was still entitled to summary judgment, because these three preconditions are necessary but not sufficient to make out a Section 2 claim. Rather, the plaintiffs in a Section 2 case must prove that, under the "totality of circumstances," black have less opportunity than others to participate in the political process and elect candidates of their choice. *Id.*

1. The Magistrate's Report and Recommendation

On April 26, 2002, the Magistrate issued a report recommending that the District Court grant the United States' motion for partial summary judgment and deny the County's motion. App. 151a. The Magistrate refused to consider the County's argument that partisanship was the cause of white bloc voting, citing the Fourth Circuit's holding in *Lewis v. Alamance County, North Carolina*, 99 F.3d 600 (4th Cir. 1996), which held, in a footnote, that cause is irrelevant to an inquiry into the three *Gingles* preconditions. App 136a-137a, *citing* 99 F.3d at 615, n.12.

2. The District Court's Decisions

On July 10, 2002, the District Court adopted the Magistrate's recommendations and granted partial summary judgment in favor of the United States, holding that the *Gingles* preconditions had been satisfied. *See* App. 103a-104a. The court found no dispute with respect to the first two *Gingles* preconditions, (a) size and compactness and (b) minority political cohesiveness. App. 107a. With respect to the third precondition, white bloc voting, the District Court pointed to evidence that non-whites tended to vote as a bloc for Democrats, and that whites tended to vote as a bloc for Republicans. App. 119a. Under these circumstances, the District Court held, the third *Gingles* precondition was clearly satisfied by evidence that white-preferred Republicans defeated minority-preferred Democrats in a series of elections. *Id.* The District Court refused to consider, in light of *Alamance County*, the County's argument that white bloc voting resulted from partisanship rather than race. *See* App. 112a.

On March 6, 2003, after a bench trial, the District Court held that the at-large system of electing the Charleston County Council violated Section 2 under the totality of the circumstances. App. 24a-25a. According to the Court, plaintiffs' establishment of the *Gingles* preconditions presaged Section 2 liability. *See* App. 39a. Thus, in the District Court's view, it would only be in a "very unusual case" where the *Gingles* preconditions had been satisfied that the court would not also find a violation of Section 2 under the totality of the circumstances. *Id.*

The District Court again rejected the County's partisanship arguments. The court repeated its prior holding that non-racial causes for white voting patterns, such as

partisanship, were irrelevant to the question of whether plaintiffs had established the *Gingles* preconditions. *See* App. 84a-87a. The District Court acknowledged, however, that voting causation is relevant to the question of whether Section 2 plaintiffs have proved their claim under the totality of circumstances. *See id.*

The County presented evidence that partisanship, not race, provided the best explanation for why candidates preferred by blacks usually lost. In particular, the County demonstrated that

- certain candidates, who had lost election despite strong minority support when running as Democrats, won election without minority support after switching to the Republican Party;

- although over the past several years white voters have provided little electoral support for black Democrats, they have repeatedly supported the election of a black Republican County Council member; and

- the makeup of the Charleston County School Board, a majority of whose members are blacks elected in non-partisan elections, demonstrates that minorities can achieve electoral success when the Democratic Party identifier is removed.

See App. 89a-91a.

The District Court, however, discounted the County's evidence, stating that the concept of voting causation was "desperately illusive." App. 88a. According to the court, it would be impossible to separate out the individual influences of race and party as separate causes of white bloc voting. *See* App. 92a-93a. Consequently, the District Court

held that Plaintiffs had proved a violation of Section 2 under the totality of circumstances.[3]

3. The Fourth Circuit's Decision

The Fourth Circuit affirmed the District Court and rejected the County's argument that partisanship, rather than race, accounted for white bloc voting. The Fourth Circuit agreed with the lower court that causation was irrelevant to the *Gingles* preconditions and relevant only to the totality of circumstances inquiry. App. 11a-12a. The Fourth Circuit also held that the County had not met its burden of proving, under the totality of the circumstances, that partisanship was the cause of racially polarized voting. Like the District Court, the Fourth Circuit considered that it was impossible to separate the effects of race and partisanship, and stated that the County had provided insufficient evidence to prove otherwise. App. 20a. Regarding the County's evidence that certain minority-preferred Democratic candidates lost their minority support only upon switching to the Republican Party, the court could not determine whether minority voters abandoned these candidates solely for partisan reasons. *See* App. 20a-22a. Additionally, the court found that the County's evidence of white support for a black Republican County Council member, and black majority control of the Charleston County School Board was anecdotal and insufficient. *Id.*

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[3] The District Court rejected the private plaintiffs' claim that the at-large system was adopted with an intent to discriminate. App. 97a-101a. The District Court found persuasive the County's evidence that the at-large voting system enacted in 1969 was, in fact, intended to satisfy the one-person, one-vote mandate of the Court as set forth in *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Avery v. Midland County*, 390 U.S. 474 (1968). *See* App. 100a-101a.

REASONS FOR GRANTING THE WRIT

A. This Court Should Grant Certiorari to Resolve the Split Among the Circuits Regarding Voting Causation

Although the courts below followed Fourth Circuit precedent, there exists a split among the Circuits regarding the relevance of the cause of white bloc voting to a claim of vote dilution under Section 2. Petitioners respectfully request that this Court grant certiorari to resolve this split. *See* Sup. Ct. R. 10(a).

This Court addressed the issue of voting causation in *Gingles*, a decision that produced a division among the Justices on this issue. The ambiguity of this decision has resulted in lower court decisions that treat voting causation in vastly different ways. An early decision treated voting causation as completely irrelevant to a claim of vote dilution. At the other end of the spectrum, the Fifth Circuit rejected claims under Section 2 for failure to satisfy the *Gingles* preconditions when plaintiffs failed to show that differences between black and white voting behavior stemmed from racial causes. Still other courts, including the court below, hold that the issue of voting causation is relevant, but only in the context of a totality of circumstances inquiry.

1. The Voting Rights Act

Section 2 of the Voting Rights Act prohibits States from implementing any "standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). A challenged electoral practice does not violate Section 2 unless it is shown that minorities "have less opportunity than other members of the electorate

to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Congress intended Section 2 to codify the "results test," the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Mobile v. Bolden*, 446 U.S. 55 (1980). *Gingles*, 478 U.S. at 44 n.8; S. REP. No. 417, 97th Cong., 2nd Sess., *reprinted in* 1982 U.S.C.C.A.N. 177, 205. Under this standard, a plaintiff need not prove intentional discrimination to prove a violation of Section 2. *See Nipper v. Smith*, 39 F.3d 1494, 1520 (11th Cir. 1994) (*en banc*), *cert. denied,* 514 U.S. 1083 (1995). However, a plaintiff must establish that vote dilution occurred "on account of race or color." *See Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361-62 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993). Congress did not intend Section 2 to remedy losses resulting from partisanship, or to provide minorities with proportional representation. *See, Nipper*, 39 F.3d at 1518 n.49, *citing Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971).

2. *Gingles* Requires Section 2 Plaintiffs to Prove that Minority-Preferred Candidates Usually Lose Because of White Bloc Voting

Gingles established the framework for proving claims under Section 2. Under this framework, minority plaintiffs must first prove the existence of three "preconditions." Plaintiffs must establish that (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group it is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *See* 478 U.S. at 50-51.

Establishment of the preconditions does not in itself prove a violation of Section 2. *See Johnson v. De Grandy*, 512 U.S. 997, 1010-12 (1994). Plaintiffs must also show that under the totality of circumstances minority voters have been deprived of equal access to the political process. *See Gingles*, 478 U.S. at 79. In the present case, however, the District Court held that the establishment of the *Gingles* factors presages liability. According to the court, it will be only "the very unusual case" in which a plaintiff establishes the *Gingles* preconditions but fails to establish a violation of Section 2 under the totality of the circumstances. *See* App. 39a, *citing Teague v. Attala County*, 92 F.3d 283, 293 (5th Cir. 1996), *cert. denied,* 522 U.S. 807 (1997).

3. *Gingles*, However, Left Unclear Whether Differences in Black and White Voting Behavior Caused by Factors Other than Race Suffice Under Section 2

The *Gingles* Court split on the issue of voting causation. Justice Brennan, joined by three other Justices, reasoned that causation was irrelevant to claims of vote dilution under Section 2. *See* 478 U.S. at 63-64. According to Justice Brennan, it makes no difference why a contested voting system results in minority electoral losses. All that matters is that blacks and whites vote differently. *Id.* Under this theory, it makes no difference whether white bloc voting results from racial hostility or political partisanship, because all that matters is the behavior of white voters, not the reasons for it. *See Jackson v. Edgefield County*, 650 F. Supp. 1176, 1197 (D.S.C. 1986) (cause of white voting patterns irrelevant).

In contrast to Justice Brennan, Justice O'Connor, also writing for four justices, found voting causation to be very relevant. *See* 478 U.S. at 100 (O'Connor, J., concurring). In the view of these four Justices, the defeat of a minority-preferred candidate for non-racial reasons clearly would be relevant to determining whether white bloc voting would consistently result in the defeat of minority-preferred candidates. *See id.* Such evidence would suggest that another minority-preferred candidate might be able to attract greater white support in future elections. *Id.* Under this rationale, a court cannot rule for minority plaintiffs if there is evidence that partisanship, not race, was the predominant reason for white bloc voting. *See League of United Latin American Citizens Council No. 4434 v. Clements*, 999 F.2d 831, 850-60 (5th Cir.1993) (*en banc*), *cert. denied*, 510 U.S. 1071 (1994) (*LULAC*). For plaintiffs to prevail, they must prove that voting patterns are best explained by racial bias. *See Nipper v. Smith*, 39 F.3d at 1520.

Justice White, writing a separate concurrence, also rejected the section of Justice Brennan's plurality opinion addressing causation, but on different grounds. *See* 478 U.S. at 83 (White, J., concurring). Justice White felt that the plurality opinion, which focused exclusively on how whites and blacks vote, ignored the race of the candidate. *See id.* According to Justice White, under Justice Brennan's rationale, a court could find white bloc voting even if whites elect black Republican candidates, precisely the situation in the present case. Justice White rejected Justice Brennan's position because it would constitute "interest-group politics rather than a rule hedging against racial discrimination." *Id.* at 83; *cf. Baird v. Consolidated City of Indianapolis*, 976 F.2d at 361-62 (no violation found in case where one of the four victors in at-large contests was a black Republican).

4. In the Wake of *Gingles*, the Lower Courts Have Split on the Relevance of the Causes of White Bloc Voting

a. One Court Has Held That Voting Causation Is Completely Irrelevant

Gingles has resulted in widely divergent rulings on voting causation. In an early decision, the court held that the cause of racially polarized voting was completely irrelevant. *See Edgefield County*, 650 F. Supp. at 1197. In that case, black voters challenged the county's at-large system for electing members of the school board. The court refused to consider the defense expert's characterization of racially polarized voting because it interjected a consideration of racial motive as the cause for racially divisive voting behavior. *Id.* Based on Justice Brennan's decision in *Gingles*, the court held that the cause of voter behavior is no longer a relevant inquiry. *Id.*

b. Other Courts Have Held That Causation Is Relevant to Prove the *Gingles* Preconditions

Other courts have held that the cause of white bloc voting must be taken into consideration in determining whether the plaintiff has established the *Gingles* preconditions. *See LULAC,* 999 F.2d at 850-860. In *LULAC*, the Fifth Circuit, sitting *en banc*, noted that a majority of Justices in *Gingles*, as well as the Court's earlier voting rights decisions, were concerned only with "legally significant" white bloc voting, in which minority defeats were the result of racial bias, and not partisanship. *Id.* at

850-54. Under *LULAC*, when partisan affiliation, not race, best explains divergent voting patterns among minority and white citizens, minorities have not been excluded from the political process, and there is no violation of Section 2. *Id.* at 850. In *LULAC*, as in the present case, blacks in various Texas counties preferred Democratic candidates, while whites preferred Republicans candidates. Id. at 860-61.[4] As in the present case, white voters supported Republicans, regardless whether they were black or white. *See id.* at 878-893. Consequently, the Fifth Circuit reversed a district court for failing to consider the cause of differences in black and white voting behavior in determining whether minority plaintiffs had proved white bloc voting under *Gingles*. *Id.; see also Clarke v. City of Cincinnati*, 40 F.3d 807, 812-14 (6th Cir. 1994), *cert. denied,* 514 U.S. 1109 (1995) (agreeing with the five Justices opposed to that portion of Justice Brennan's decision addressing voting causation, and finding that incumbency does not generally serve as a mask for racially polarized voting, but not specifically reaching other causes of white bloc voting because plaintiffs had not made the threshold showing that minority-preferred candidates were regularly defeated); *see also Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997), *cert. denied,* 522 U.S. 1076 (1998) (in principle, voting causation is relevant to third *Gingles* precondition).[5]

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[4] At issue in this case was Texas's at-large system of electing state trial judges. *See* 999 F.2d at 831.

[5] Courts are also in disagreement on the specific causes that will affect a finding of white bloc voting. Some courts hold that plaintiffs in a Section 2 case have the burden of proving racial bias as the likely explanation for white bloc voting patterns. *See Nipper v. Smith*, 39 F.3d at 1514-26; *see also Vecinos De Barrio Uno v. City of Holyoke*, 72 F. 3d 973, 981 (1st Cir. 1995) (plaintiffs cannot prevail on a Section 2 claim if there is significantly probative evidence of white bloc voting for reasons wholly unrelated to racial animus). Other courts merely hold plaintiffs to

(Continued ...)

c. Still Other Courts Have Held that Causation is Irrelevant Except in the Totality of Circumstances Inquiry

Still other courts, such as the Fourth Circuit here, have refused to consider the causes of differences in black and white voting patterns in the context of the *Gingles* factors. These courts will consider causation evidence only as part of the "totality of circumstances" inquiry. *See, e.g., Lewis v. Alamance County* 99 F. 3d at 615 n.12; *Goosby v. Town Board of the Town of Hempstead*, 180 F.3d 476 (2nd. Cir. 1999), *cert. denied*, 528 U.S. 1138 (2000); *Sanchez v. Colorado*, 97 F.3d 1303, 1321 (1996), *cert. denied*, 520 U.S. 1229 (1997).

(... Continued)
the burden of disproving proffered evidence of partisanship as the reason for white bloc voting patterns. *See LULAC* 999 F.2d at 850-860.

B. The Court of Appeals Erred in Assigning the Burden of Proof on the Issue of Voting Causation to Petitioners.

The Fourth Circuit erred in requiring the County to prove that partisanship, rather than race, best explained the difference in the voting behavior of blacks and whites. It was not the County's burden to prove partisanship, but rather plaintiffs' burden to negate the County's evidence of partisanship. *See LULAC*, 999 F.2d at 850. Under Section 2, the burden of proof is on the Plaintiffs, not the County, to establish every element of their vote dilution claim under the *Gingles* preconditions and under the totality of the circumstances. *Vecinos De Barrio Uno v. City of Holyoke*, 72 F. 3d 973, 983 (1st Cir. 1995). Section 2 "does not assume the existence of racial bloc voting; Plaintiffs must prove it." *Gingles*, 478 U.S. at 46. Shifting that burden of proof to the County distorts the Section 2 inquiry and blurs the focus of a Section 2 claim that "a certain electoral law, practice, or structure ... cause[s] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47.

This Court should hold, as did the Fifth Circuit in *LULAC*, that it was the Plaintiffs' burden to disprove the County's evidence that partisanship, rather than race, was the cause of white bloc voting under *Gingles*. Absent such a requirement, liability under Section 2 depends merely upon a showing that white-preferred Republicans defeated minority-preferred Democrats. Under the analysis employed by the lower courts here, Plaintiffs can satisfy the third *Gingles* precondition, white bloc voting, upon such a showing. *See* App. 119a; *see also* 9a-12a. Although establishment of the *Gingles* preconditions does not guarantee plaintiffs a victory

in their Section 2 claim, *DeGrandy*, 512 U.S. at 1010-12, as in the view of the District Court, it comes close. *See* App. 39a. Without an examination of voting causation in the context of the *Gingles* preconditions, liability was virtually assured in this case merely because Republicans began defeating Democrats in the 1980s. Thus, by refusing to assign Plaintiffs the burden to disprove the County's partisanship evidence as part of the inquiry into the *Gingles* preconditions, the Fourth Circuit wrongfully treated these Republican victories as diluting minority voting strength without any requirement that they were procured "on account of race or color."

Furthermore, the Fourth Circuit erred in failing to seek to separate the effects of partisanship and race on white voting patterns. In many cases, race and politics may be intertwined and exceedingly difficult to untangle. *See Bush v. Vera*, 517 U.S. 952, 1061-62 (1996) (Souter, J., dissenting). However, this Court has held in other redistricting cases that courts must separate race from politics and determine whether race is the predominant factor behind districting. *Id.* at 959 (majority opinion); *see also Hunt v. Cromartie*, 526 U.S. 541, 547 (1999). Thus, the Court of Appeals may not simply throw up its hands, as it did here, and declare that it is impossible to separate racial factors from political ones.

The County here proffered substantial evidence that partisanship, rather than race, was the predominant cause of white bloc voting. In particular, the County showed that Republican victories on the County Council during the 1980s and 1990s resulted from the coattails of the Reagan revolution, which called for lower taxes and smaller government. *See* App. 190a, 215a-216a. The County further pointed out that Charles Wallace had been elected to the County Council as a Democrat in 1978, 1982, and 1986 with

97% minority support, then switched to the Republican party and received almost no minority support. *See* App. 218a-219a, 223a-224a. The County likewise proved that Charles Lybrand ran for the County Council in 1984 as a Democrat and received 94% percent of the black vote, but lost. He then switched parties and was elected to the County Council in 1990, as a Republican, with almost no minority support. *See* App. 221a-222a. Mayor Keith Summey, an independent, testified that he chose to run as a Republican for the County Council, because he would lose if he ran as a Democrat. *See* App. 227a-228a. Furthermore, Timothy Scott, a black Republican, was elected to the County Council in 1995, 1997 and 2000 with overwhelming white support, but almost no black support. *See* App. 167a, 191a-193a.

This evidence proved that partisanship was the predominant reason behind white bloc voting. Plaintiffs failed to negate this evidence, and therefore failed to negate partisanship as a cause of white bloc voting. Consequently, Plaintiffs failed to prove the third *Gingles* precondition, and their case should have failed. The Fourth Circuit erred in holding that plaintiffs satisfied the third *Gingles* precondition.

CONCLUSION

This Court should resolve the issue of whether the cause of white bloc voting is relevant to the *Gingles* preconditions, an issue that has divided the Courts of Appeals. If causation is relevant to the *Gingles* preconditions, then it was error for the courts below to refuse to consider the County's evidence of partisanship as the likely reason for white bloc voting in determining whether plaintiffs had proved those preconditions.

For all the above reasons, a writ of certiorari should issue to review the Fourth Circuit's holding that plaintiffs alleging a

violation of Section 2 are not required to negate evidence of partisanship as a part of their burden of proving white bloc voting.

Dated: July 28, 2004

Respectfully submitted,

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APPENDIX

United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
CHARLESTON COUNTY, SOUTH CAROLINA;
Charleston County Council; John O.
Conlon; Toi Ahrens Estes; Cindy M. Floyd; A.D. Jordan;
Barrett S.
Lawrimore; Timothy E. Scott; Leon E. Stavrinakis;
Charles Wallace; Curtis
E. Bostic, as members of the Charleston County Council,
Defendants-Appellants,
and
Charleston County Election Commission; Ruth C. Glover,
Defendants.
Lee H. Moultrie; George Freeman; Maggie McGill; Sandra
Fowler, Plaintiffs-
Appellees,
v.
Charleston County Council, Defendant-Appellant.

Nos. 03-2111, 03-2112.

Argued: Feb. 24, 2004.
Decided: April 29, 2004.

Background: United States and group of county voters brought action against county, alleging that county's at-large election of its council diluted minority voting strength in violation of § 2 of the Voting Rights Act. County and voters moved for partial summary judgment. The United States District Court for the District of South Carolina, Patrick

Michael Duffy, J., granted summary judgment, and following trial on remaining issue, held in favor of United States and voters.

Holding: On appeal, the Court of Appeals, Wilkinson, Circuit Judge, held that finding that county's at-large election of its council violated the Voting Rights Act was not clearly erroneous.

Affirmed.

*343 **ARGUED:** Benjamin E. Griffith, Griffith & Griffith, Cleveland, Mississippi, for Appellants. Moffatt Laughlin McDonald, American Civil Liberties Union Foundation, Atlanta, Georgia; Angela MacDonald Miller, Civil Rights Division, Appellate Section, United States Department of Justice, Washington, D.C., for Appellees. **ON BRIEF:** Joseph Dawson, III, Bernard E. Ferrara, Jr., W. Kurt Taylor, North Charleston, South Carolina; A. Arthur Rosenblum, Charleston, South Carolina, for Appellants. R. Alexander Acosta, Assistant Attorney General, Mark L. Gross, Marie K. McElderry, Civil Rights Division, United States Department of Justice, Washington, D.C., for Appellee United States.

Before WILKINSON, NIEMEYER, and DUNCAN, Circuit Judges.

Affirmed by published opinion. Judge WILKINSON wrote the opinion, in which Judge NIEMEYER and Judge DUNCAN joined.

OPINION

WILKINSON, Circuit Judge:

**1 Since 1969, Charleston County, South Carolina has been governed by a County Council composed of nine members elected in county-wide, partisan elections. Despite the County's substantial minority population, few minority-preferred candidates, and very few minority candidates, have ever been elected to the Council. The United States brought this suit, alleging that the County's at-large election of its Council diluted minority voting strength in violation of Section 2 of the Voting Rights Act of 1965. The district court agreed, finding that the County's severe voting polarization, its particular electoral structure, and its sheer size combined to deny minority voters an equal opportunity to elect their preferred representatives. Because the district court's finding is not clearly erroneous, we affirm.

I.

Located in the southeastern corner of South Carolina, where the Ashley and Cooper Rivers converge on the Atlantic, Charleston County covers over nine hundred square miles. It includes tiny municipalities like Awendaw and McClellanville; islands like Kiawah and Seabrook; and of course cities like Charleston, the state's second largest. The County is ethnically as well as geographically diverse. The third most populous of the state's forty-six counties, it has the second highest total number of black residents. Of its roughly 310,000 residents, 188,542 (60.8%) are white; 106,337 (34.3%) are black; and 15,090 (*344 4.9%) are of

other racial or ethnic descent. [1]

The numbers of registered and actual voters, however, are more disparate. As of November 2000, 177,279 people were registered to vote in Charleston County, 122,557 (69.1%) of whom were white and 54,722 (30.9%) of whom were nonwhite. Of those registered voters, 114,166 actually voted in the November 2000 general election, 82,395 (72.2%) of whom were white and 31,771 (27.8%) of whom were nonwhite. According to the evidence of voter turnout presented by the County's own expert witness, Dr. Ronald Weber, minority registered voters have consistently participated at a lower rate than white registered voters in Charleston County Council general elections.

The County Council oversees local governance on issues ranging from economic development to public safety, and it is composed of nine members elected to staggered terms in at-large, partisan elections. Candidates for the Council run from four residency districts: three Council seats are reserved for residents of the City of Charleston, three for residents of North Charleston, two for residents of West Ashley, and one for a resident of East Cooper. Charleston County is one of only three counties in South Carolina that elects its entire county council at-large, and it is the only county with a majority white population to do so. The other two counties that elect their county councils at-large, Hampton and Jasper, are less populated, rural counties with roughly equal numbers of minority and white residents.

**2 The County's modified at-large system, in which all of the County's residents may vote for candidates residing in

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[1] Those of other racial or ethnic descent include persons of Hispanic, American Indian, Alaskan Native, Asian, or Hawaiian or Pacific Islander descent.

specific areas of the County, was created in 1969, and it was precleared by the Attorney General under Section 5 of the Voting Rights Act. *See* 42 U.S.C. § 1973c (2003). In 1989, the County's residents narrowly rejected a referendum to switch from the at-large electoral system to a single-member district system. Both the County and the United States agree that voting on the referendum was extremely polarized: at least 98% of minority voters approved the switch to single-member districts, while at least 75% of white voters wanted to retain at-large elections.

Since 1970, 41 people have been elected to the County Council, only three of whom are minorities: Lonnie Hamilton III, who was elected six times between 1970 and 1990, serving a total of twenty-four years; Marjorie Amos-Frazier, who was elected twice in 1974 and 1978; and Timothy Scott, who has remained the Council's only minority member since 1995. While minority candidates preferred by minority voters have had great difficulty winning election to the Council, white candidates who were preferred by minority voters have been somewhat more successful, according to evidence of recent Council elections presented by the United States' expert witness, Dr. Theodore Arrington.

II.

A.

Section 2(a) of the Voting Rights Act prohibits a State or its political subdivision from imposing any voting practice that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...." 42 U.S.C. § 1973(a). Section 2(b), as amended in 1982, further provides that a violation of § 2(a) occurs

***345** if, based on the totality of the circumstances, it is

> shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [§ 2(a)] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. § 1973(b). The 1982 amendment made clear that Section 2 condemns not only voting practices borne of a discriminatory intent, but also voting practices that "operate, designedly or otherwise," to deny "equal access to any phase of the electoral process for minority group members." S.Rep. No. 97- 417, at 28, 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205, 207 (hereinafter "Senate Report"); *see also Chisom v. Roemer*, 501 U.S. 380, 393-95 & nn. 20-21, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991).

In *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court established the framework for claims that an at-large voting system dilutes minority voting strength in violation of § 2 of the Voting Rights Act. According to the Court, three preconditions are necessary to a finding of vote dilution:

> **3 First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district....
>
> Second, the minority group must be able to show that it is politically cohesive....
>
> Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 50-51, 106 S.Ct. 2752 (citations and footnotes omitted). If these three preconditions are satisfied, then the trier of fact must determine whether, based on the totality of the circumstances, there has been a violation of

Section 2. *Johnson v. DeGrandy*, 512 U.S. 997, 1011- 12, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Cane v. Worcester County*, 35 F.3d 921, 925 (4th Cir.1994).

In determining which circumstances courts should take care to consider, the Supreme Court has turned for guidance to the Senate Report that accompanied Congress's 1982 amendments to the Voting Rights Act. *See* *Gingles*, 478 U.S. at 43-45, 106 S.Ct. 2752. According to Congress and the Court, the most important factors in the inquiry into the totality of the circumstances are the "extent to which minority group members have been elected to public office in the jurisdiction," and "the extent to which voting in the elections of the state or political subdivision is racially polarized." *Id.* at 48-49 n. 15, 106 S.Ct. 2752 (quoting Senate Report at 28-29) (internal quotation omitted). If these factors are present, other considerations "are supportive of, but *not essential to* " a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which the State or political subdivision has used voting practices that enhance the opportunity for discrimination against the minority group, such as unusually large election districts or anti-single shot provisions; the exclusion of minorities from the candidate slating process; the use of racial appeals in political campaigns; and the degree to which past discrimination in such areas as education, employment and health has hindered the ability of minorities to participate effectively in the political process. *Id.* (emphasis in original).

***346** However, this list is "neither comprehensive nor exclusive." *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752; *see* Senate Report at 29 ("[The Senate Report's factors] will often be the most relevant ones, [but] in some cases other factors will be indicative of the alleged dilution."). Congress

intended "the ultimate conclusions about equality or inequality of opportunity ... to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *DeGrandy*, 512 U.S. at 1011, 114 S.Ct. 2647.

B.

**4 Before the district court, Charleston County's at-large method for electing its County Council was challenged as a violation of § 2 by both the United States and a group of Charleston County voters. The United States and the private plaintiffs claimed that the County's at-large method resulted in the unlawful dilution of minority voting strength. In addition, the private plaintiffs--but not the United States--claimed that the County's at-large system intentionally discriminated against minority voters. Both the United States and the private plaintiffs moved for partial summary judgment as to the three *Gingles* preconditions necessary to establish a § 2 violation.

On April 26, 2002, based on the reports and testimony of both Dr. Arrington, the United States' expert; and Dr. Weber, the County's expert, the magistrate judge recommended that the plaintiffs' motion be granted. On the first *Gingles* precondition--numerosity and compactness--the magistrate judge found that the minority population of Charleston County is sufficiently large and geographically compact to constitute a majority in a single-member district. On the second *Gingles* precondition--minority cohesion--the magistrate judge reviewed evidence presented by both parties indicating that minority voters in Charleston County are politically cohesive. For instance, according to Dr. Weber, minority voters have been politically cohesive in 28 of 33(85%) contested Council elections since 1988.

Finally, on the third *Gingles* precondition--majority bloc voting--the magistrate judge again reviewed evidence from both parties that minority voters' preferred Council candidates are usually defeated by cohesive white voting. Pursuant to our decision in *Lewis v. Alamance County*, 99 F.3d 600, 615-16 n. 12 (4th Cir.1996), the magistrate judge declined to consider Charleston County's argument that minority-preferred candidates were usually defeated on account of partisanship, not race. According to the magistrate judge, *Alamance County* renders causation irrelevant to the third *Gingles* pre-condition: the question for purposes of the third *Gingles* precondition is whether whites vote as a bloc, and not why they do so. Under *Alamance County*, according to the magistrate judge, causation is instead relevant to the inquiry into the totality of the circumstances, once the *Gingles* preconditions have been satisfied.

On July 10, 2002, the United States District Court for the District of South Carolina adopted the magistrate's report, and granted summary judgment to the United States and the private plaintiffs as to the three *Gingles* preconditions. The district court then held a trial on the remaining issue: whether, based on the totality of the circumstances, the County's at-large electoral method violated § 2. On March 6, 2003, the district court agreed with the United States that the County's at-large system diluted minority voting strength, depriving minority voters of an equal opportunity to participate in the political process and elect representatives of their choice. However, the district court rejected ***347** the private plaintiffs' claim that the County's at-large system was adopted with the intent to discriminate against minority voters.

Charleston County now appeals the district court's decision.[2] The County does not challenge the district court's finding that the United States had established the first two *Gingles* preconditions: the County concedes not only that its minority voters are sufficiently numerous and geographically compact to constitute a majority in a single-member district, but also that they are politically cohesive. The County, however, does contend that the district court erred in granting summary judgment to the plaintiffs on the third *Gingles* precondition--the presence of white racial bloc voting. The County also contends that, even if the three *Gingles* preconditions were satisfied, the district court clearly erred in determining that the at-large voting scheme diluted minority voting strength in violation of § 2. We address the County's claims in turn.

III.

**5 The crux of the County's argument, from the outset of this litigation, has been that voting in Charleston County is polarized as a result of partisanship rather than race. According to the County, whites vote as a bloc--but for Republican candidates, whatever their race--and blacks vote as a bloc--but for Democratic candidates, whatever their race. In the County's view, the third *Gingles* precondition requires more than a showing that white bloc voting usually defeats the minority-preferred candidate. In order to demonstrate *Gingles* ' "legally significant" white bloc voting,

[2] The private plaintiffs also appeal. However, because we affirm the district court's finding that the County's at-large system violated § 2 by diluting minority voting strength, we do not need to reach the private plaintiffs' claim that the at-large system violated § 2 by intentionally discriminating against minority voters.

the County claims, the United States must prove that race rather than partisanship is the cause of the polarized voting. *See* 478 U.S. at 56, 106 S.Ct. 2752. For its part, the United States responds that evidence of partisanship as the cause of the racially divergent voting should be considered in the totality of the circumstances inquiry, after the *Gingles* preconditions have been satisfied.

The parties thus rightly agree that an inquiry into causation is relevant. *See Alamance County*, 99 F.3d at 615-16 n. 12; *see also Gingles*, 478 U.S. at 100, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment) ("Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates."); *Uno v. City of Holyoke*, 72 F.3d 973, 982 (1st Cir.1995) ("[Section 2] does not require courts to ignore evidence that factors other than race are the real obstacles to the political success of a minority group."); *League of United Latin Am. Citizens (LULAC) v. Clements*, 999 F.2d 831, 850 (5th Cir.1993) (en banc) ("[The] rigorous protections [of the Voting Rights Act], as the text of § 2 suggests, extend only to defeats experienced by voters 'on account of race or color.' "). The parties simply disagree over the stage in the vote dilution inquiry at which causation evidence is appropriate.

As we explained in *Alamance County*, the approach most faithful to the Supreme Court's case law "is one that treats causation as irrelevant in the inquiry ***348** into the three *Gingles* preconditions, but relevant in the totality of circumstances inquiry." *Alamance County*, 99 F.3d at 615-16 n. 12 (citations omitted); *see also Gingles*, 478 U.S. at

100, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment) (explaining that causation evidence should be part of "the overall vote dilution inquiry"). The inquiry into the *Gingles* preconditions is a preliminary one, designed to determine whether an at-large system potentially violates § 2. *See Growe v. Emison*, 507 U.S. 25, 40-41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). An at-large system cannot be responsible for diluting minority voting strength unless minority voters cohesively support particular candidates, the minority-preferred candidates are being systematically defeated by white bloc voting, and those defeats would not be occurring under a system of single-member districts. *See id.*

**6 But simply clearing the *Gingles* hurdles, while necessary to prove a possible violation of § 2, is not sufficient to establish an actual violation. *DeGrandy*, 512 U.S. at 1011-12, 114 S.Ct. 2647. To demonstrate an actual violation, a plaintiff asserting vote dilution must show "that, under the totality of the circumstances, the State's [challenged electoral scheme] has the effect of diminishing or abridging the voting strength of the protected class." *Voinovich v. Quilter*, 507 U.S. 146, 157, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). Accordingly, a court must undertake "a searching practical evaluation of the past and present reality," *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752 (quoting Senate Report at 30) (internal quotation omitted), which demands a "comprehensive, not limited, canvassing of relevant facts," *DeGrandy*, 512 U.S. at 1011, 114 S.Ct. 2647. It is this inclusive examination of the totality of the circumstances that is tailor-made for considering why voting patterns differ along racial lines.

By expanding the inquiry into the third *Gingles* precondition to ask not merely whether, but also why, voters are racially

polarized, the County would convert the threshold test into precisely the wide-ranging, fact-intensive examination it is meant to precede. We have rejected this approach, *Alamance County*, 99 F.3d at 615-16 n. 12, as has the majority of our sister circuits, *compare Goosby v. Town Bd.*, 180 F.3d 476, 493 (2d Cir.1999) (treating causation under the totality of circumstances analysis rather than the third *Gingles* precondition); *Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194, 1199 (7th Cir.1997); *Sanchez v. Colorado*, 97 F.3d 1303, 1313 (10th Cir.1996); *Uno*, 72 F.3d at 980-81; *Nipper v. Smith*, 39 F.3d 1494, 1524-25 & n. 60 (11th Cir.1994) (en banc), *with LULAC*, 999 F.2d at 891-92 (finding third *Gingles* precondition unsatisfied because "partisan affiliation, not race, caused the defeat of the minority-preferred candidate").

The County also misfires when it argues that by referring to the third *Gingles* precondition as "legally significant" white bloc voting, what the *Gingles* Court meant was white bloc voting that occurs on account of racial animus or bias. *Gingles*, 478 U.S. at 56, 106 S.Ct. 2752. Rather, what the *Gingles* Court meant was the *degree* of racially polarized voting that matters in the context of § 2. According to the Court, for racially polarized voting to be "legally significant," minority voters must "usually" vote for the same candidates, and white bloc voting must "normally" or "generally" lead to the defeat of minority-preferred candidates. *Id.* "Legally significant" white bloc voting thus refers to the frequency with which, and not the reason why, whites vote cohesively for candidates who are not backed by minority ***349** voters. The County does not even attempt to argue that its racially polarized voting is legally insignificant in this sense. Indeed, the County's own expert testified that minority-preferred candidates are usually defeated by white bloc voting. The district court therefore properly found the

third *Gingles* precondition satisfied.

IV.

**7 The County next argues that, even if the *Gingles* preconditions were satisfied, the district court clearly erred in determining that the County's at-large voting scheme violated § 2. According to the County, the district court improperly discounted substantial evidence that party affiliation, not racial animus, drives voting in the County, which has an increasingly strong Republican base. In the County's view, even if the district court was right not to consider this evidence of partisanship in connection with the third *Gingles* precondition, it still should have been swayed by this same evidence when it assessed the totality of the circumstances.

Certainly the reason for polarized voting is a critical factor in the totality analysis and Charleston County has presented evidence of partisanship. For instance, since 1995 Timothy Scott has repeatedly been elected as a minority Republican (Scott recently finished his term as Chairman of the Council), with overwhelming support from white voters and only minimal support from minority voters. Although Scott is the Council's only minority member in the last decade, the County claims that Scott's success shows minorities can win election to the Council, so long as they share the political philosophy that prevails among the majority of Charleston County's residents. In addition, two white Council members, Dr. Charles Wallace and Charlie Lybrand, ran as minority-preferred Democrats and lost, only to switch parties and win as Republicans with little minority support. According to the County, all of this demonstrates that minority-preferred candidates have suffered electoral defeat on account of partisan politics, not race or color.

We need not inquire whether we would have been persuaded by the County's evidence in the first instance, for our function is not to reweigh the evidence presented to the district court. Claims of vote dilution require trial courts to immerse themselves in the facts of each case, and to engage in "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79, 106 S.Ct. 2752 (internal quotation omitted); *see also Goosby*, 180 F.3d at 492 ("[R]esolution of the question of vote dilution is a fact intensive enterprise to be undertaken by the district court."). The Supreme Court has been explicit that in order to "preserve[ ] the benefit of the trial court's particular familiarity with the indigenous political reality," we may set aside a trial court's finding of vote dilution only if it is clearly erroneous. *Gingles*, 478 U.S. at 79, 106 S.Ct. 2752; *see also Cane v. Worcester County*, 35 F.3d 921, 925 (4th Cir.1994). While the district court's finding that the County's at-large voting scheme violated § 2 is certainly disputable, it is not clearly mistaken. Rather, the district court's finding rested on substantial, credible evidence, much of it presented by the County's own expert, Dr. Weber.

A.

****8** First, both Congress and the Supreme Court have made clear that among the most important factors in assessing a vote dilution claim are "the extent to which voting in the elections of the state or political subdivision is racially polarized," and "the extent to which minority group members***350** have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 48-49 n. 15, 106 S.Ct. 2752 (quoting Senate Report at 28-29). Neither of these factors was in any serious dispute before the district court. The United States presented uncontroverted evidence of

racial polarization and minimal minority electoral success.

According to Dr. Weber, there was racially polarized voting in 25 of the 33 (75.8%) contested general elections for the County Council between 1988 and 2000. In the 10 general elections that involved at least one minority candidate, Dr. Weber found that white and minority voters were polarized 100% of the time. *See Alamance County*, 99 F.3d at 610 n. 8 (suggesting that elections involving minority candidates may be more probative "on the question of whether racial polarization exists"); *accord Ruiz v. City of Santa Maria*, 160 F.3d 543, 552-53 (9th Cir.1998); *Uno*, 72 F.3d at 988 n. 8; *N.A.A.C.P. v. City of Niagara Falls*, 65 F.3d 1002, 1016-18 (2d Cir.1995); *Nipper*, 39 F.3d at 1540; *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1128 (3d Cir.1993); *LULAC*, 999 F.2d at 864.

Notably, the United States' expert, Dr. Arrington, found an even higher overall rate of racially polarized voting in contested Council elections between 1984 and 2000 (94% to Weber's 75.8%). But whatever the actual level of polarization, evidence presented by both parties supported the district court's conclusion "that voting in Charleston County Council elections is severely and characteristically polarized along racial lines." Indeed, Charleston County voters are racially divided not only over the desirability of particular candidates, but over the desirability of the at-large system itself. In 1989 the County held a referendum on switching from the at-large system for County Council elections to a system of single-member districts: at least 98% of minority voters endorsed the change, while at least 75% of white voters wanted to retain at-large elections.

**9 As for minority electoral success, of the 41 people elected to the nine-member Council since 1970, only 3 have

been minorities: Lonnie Hamilton III, Marjorie Amos-Frazier, and Timothy Scott. Of those only Scott has served on the Council in the last decade. As the district court recognized, the electoral successes of Hamilton and Amos-Frazier in the 1970s and 1980s were of marginal relevance to whether minorities currently enjoy equal access to the electoral process. In fact, Dr. Weber declined to consider pre-1988 elections, recognizing that recent elections are the most probative in determining vote dilution. *See, e.g.,* Ruiz, 160 F.3d at 555; *Uno,* 72 F.3d at 990; *Meek v. Metropolitan Dade County,* 985 F.2d 1471, 1482-83 (11th Cir.1993). And the rarity with which minorities are elected is not unique to the County Council: disproportionately few minorities have ever won any of the at-large elections in Charleston County.

However, the County repeatedly asserts that the district court mistakenly considered only *minority* candidates' success, rather than *minority-preferred* candidates' success, as part of the totality of the circumstances. The County is certainly right that"[t]he extent to which members of a protected class have been elected to office" is but "one circumstance which may be considered" in assessing whether minority voters have been denied an equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b); *see also id.* ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

***351** Yet the district court did not treat the lack of minority electoral success as conclusive proof of vote dilution. Rather, pursuant to the clear command of Congress and the Supreme Court, the district court treated minimal minority electoral success as but one factor in the totality of the circumstances inquiry. *See* Gingles, 478 U.S. at 48-49 n. 15,

106 S.Ct. 2752. The district court recognized that the number of minorities elected to office, while relevant to vote dilution, was not dispositive, and it went on to analyze a host of other factors that weighed in its decision. The court was aware that the ultimate question remained whether minority voters were able to elect their preferred candidates, whatever the candidates' race. *See Alamance County*, 99 F.3d at 606-07.

Neither did the district court overlook the success of minority-preferred candidates in assessing the totality of the circumstances. According to the County, the district court ignored dozens of Council elections during the past thirty-plus years in which minority-preferred candidates prevailed. As an initial matter, the County overstates its case: two-thirds of the elections to which the County points occurred prior to 1988, and yet Dr. Weber did not consider pre-1988 Council elections. In other words, the County faults the district court for not examining election results that the County's own expert viewed as marginally relevant.

****10** As for the post-1988 elections, the County is correct to note that minority-preferred candidates met with some limited success, which is surely relevant to the inquiry into the totality of the circumstances. But Dr. Weber himself testified that minority-preferred candidates, whatever their race, generally were defeated by white bloc voting. Dr. Weber's testimony, along with other evidence that we discuss below, permitted the district court to fairly conclude that the at-large system was diluting minority vote strength, even if minority-preferred candidates still occasionally managed to prevail. And it is not as if the district court ignored altogether the post-1988 elections. Rather, the district court discussed at length Dr. Weber's and Dr. Arrington's reports, which analyzed the very post-1988 elections that the district court is

supposed to have neglected. The County cannot credibly claim that the district court's focus was too narrow, or its analysis too slipshod.

B.

Second, the district court found that County Council's electoral structure, along with the County's sheer size, diminished minority voters' ability to elect their preferred representatives. As we explained earlier, candidates for the County Council must qualify from one of four residency districts, and they are then elected in partisan contests to staggered four-year terms. Both the parties' experts agree that the County's use of staggered terms, residency districts, and a primary nominating system makes it more difficult for minority-preferred candidates to prevail. The residency districts and staggered terms confine County Council elections to either single-seat or two-seat contests, and the primary nominating system produces only two viable candidates for each seat. As even the County's expert testified, this creates a de facto majority vote requirement, and limits the opportunity for minority voters to engage in single-shot voting.[3]

***352** Further, Charleston County is the largest county in South Carolina, with a nearly 100-mile stretch of coastline along the Atlantic. Several witnesses testified that the County's size works to the detriment of minority candidates,

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[3] Single-shot voting is a strategy that "enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates." *Gingles*, 478 U.S. at 38-39 n. 5, 106 S.Ct. 2752 (internal quotation omitted). Single-shot voting is not possible in a one-seat election, and it is normally of limited usefulness (if it is not even counter-productive) in a two-seat election.

who typically have fewer financial resources, in particular because costly television advertising and direct mail have proven important in recent Council elections. *See* Goosby, 180 F.3d at 494 ("Campaign financing is especially difficult in such a large district for black candidates, who have been able to campaign more effectively in smaller districts.").

C.

**11 Third, although the County argued that partisanship rather than race drives the County's racially polarized voting patterns, there was no systematic proof to support its claim. Dr. Weber, the County's expert, acknowledged that he could not assess the extent to which racial bias has caused polarized voting in Charleston County, and he agreed with other expert witnesses that partisanship and race as determinants of voting are "inextricably intertwined." Even assuming that the effects of partisanship and race on voting could have been isolated and measured, no such evidence was before the district court. As both parties' experts testified, and as the district court explained, party registration information and survey research are the primary data relied on by political scientists in determining the effect of political partisanship on electoral outcomes. Neither datum is available for Charleston County Council elections, because the County does not require that voters register by party for general elections and neither the County nor the United States has conducted any survey research.

The County did present anecdotal evidence of partisanship, such as that some candidates (Wallace and Lybrand) had switched parties and won election to the Council, or that a minority Republican (Scott) has been elected to Council several times. The County also presented evidence of Charleston County School Board elections, which are non-

partisan and which the County claims are less severely polarized along racial lines. However, the district court thoroughly examined all of the County's evidence, and deemed it insufficiently comprehensive or persuasive. For instance, the district court found the evidence pertaining to the School Board elections of questionable value, in part because the parties' experts disagreed over whether the School Board elections were even less racially polarized. But even to the extent that minority-preferred candidates fared better in School Board than in Council elections, the district court recognized that this was due at least in part to special circumstances like minority candidates' running unopposed, single-shot voting, or a split in the white vote among several white candidates. Likewise, the district court struggled in weighing the County's evidence of party-switching, because the court could not determine whether minority voters abandoned their support of Wallace and Lybrand solely for partisan reasons. In the end, the district court was faced with inconclusive evidence of partisanship as the determinant of voting, but "decisive[ ]" evidence of "severe voting polarization, minimal minority electoral success, and an uncommonly large voting district."

***353** The County's evidence of partisanship in this case was also far from persuasive on its own terms. Dr. Weber conceded that minority preferred minority candidates are defeated more often than minority-preferred white candidates. To be more precise, looking at County Council elections since the early 1990s, white Democrats have at least occasionally won, while minority Democrats have invariably lost. Although minority voters give more cohesive support to minority Democratic candidates than to white Democratic candidates, the opposite is true among white voters. This is consistent with the parties' evidence that white and minority voters are more often racially

polarized in Council general elections involving at least one minority candidate. Thus even controlling for partisanship in Council elections, race still appears to play a role in the voting patterns of white and minority voters in Charleston County. Or at least it was not clearly erroneous for the district court to so conclude.

V.

**12 The result here is required by the framework Congress established for vote-dilution claims in § 2; the proof scheme the Supreme Court set forth for such actions in *Gingles;* and, most significantly, by the findings of fact the district court made in this case, findings that were not clearly erroneous.

We need not decide whether any of the factors on which the district court relied--the County's severe voting polarization and minimal minority electoral success, its hybrid electoral structure, or its sheer size--would have been enough in isolation to prove a violation of § 2. *See* Gingles, 478 U.S. at 45, 106 S.Ct. 2752 ("[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.") (quoting Senate Report at 29). Taken in combination, these factors were sufficient to prove a § 2 violation.[4] Indeed, the County's own expert appeared to support, rather than undermine, the district court's conclusions. Based on evidence submitted by all parties, the district court conducted a "searching practical

[4] We focus on these factors because the district court thought them most important, and because they most clearly support the district court's conclusion that the County's at-large system violates § 2. The district court also found that other factors, like past discrimination that has hindered the present ability of minorities to vote or to participate equally in the political process, weighed in favor of its decision.

evaluation" of local electoral conditions in the County, and its conclusion that Charleston County's at-large system violated § 2 of the Voting Rights Act is not clearly erroneous. *Id.* (quoting Senate Report at 30). The judgment of the district court is therefore

AFFIRMED.

365 F.3d 341, 2004 WL 906511 (4th Cir.(S.C.))

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United States District Court,
D. South Carolina,
Charleston Division.

THE UNITED STATES of America, Plaintiff,
v.
CHARLESTON COUNTY, South Carolina Charleston County Council; John O. Conlon, Toi Ahrens Estes, Cindy M. Floyd, Curtis E. Bostic, A.D. Jordan, Barrett S. Lawrimore, Timothy E. Scott, Leon E. Stavrinakis, Charles Wallace, members of Charleston County Council; Charleston County Election Commission, Defendants.
Lee H. Moultrie, George Freeman Maggie McGill, and Sandra Flower, Plaintiffs,
v.
Charleston County Council and Charleston County Election Commission,
Defendants.

Nos. 2:01-0155-23, 2:01-562-23.

March 6, 2003.

Background: United States and private plaintiffs brought actions under Voting Rights Act (VRA), alleging that at-large method of electing county council unlawfully diluted minority voting strength. After cases were consolidated, U.S. moved to enjoin further elections.

Holdings: The District Court, Duffy, J., held that
(1) use of at-large method of electing county council diluted minority voting strength, in violation of § 2 of VRA, and

(2) absent more compelling evidence, at-large method of electing county council was not adopted for racially discriminatory purposes.

Judgment for United States, and partial judgment for private plaintiffs.

Opinion affirmed on appeal, 2004 WL 906511.

***270** John H Douglas, U.S. Attorneys Office, Charleston, SC, Joseph D Rich, U.S. Department of Justice, Civil Rights Division, Employment Litigation Section, Washington, DC, Christopher Coates, U.S. Department of Justice, Civil Rights Division, Washington, DC, for United States of America, plaintiff.

Laughlin McDonald, Atlanta, GA, Armand Georges Derfner, Charleston, SC, Cheryl Whipper Hamilton, Whipper Law Firm, North Charlsteon, SC, for Lee H. Moultree, George Freeman, Maggie McGill, Sandra Fowler.

A. Arthur Rosenblum, Rosenblum and Goldberg, Charleston, SC, Bernard Eugene Ferrara, Jr., Joseph Dawson, III, Charleston County Legal Department, N Charleston, SC, Samuel W Howell, IV, Howell and Linkous, Mt Pleasant, SC, Benjamin E Griffith, Cleveland, MS, for Charleston County, South Carolina, Charleston County Council.

Bernard Eugene Ferrara, Jr., Joseph Dawson, III, Charleston County Legal Department, N Charleston, SC, Samuel W Howell, IV, Howell and Linkous, Mt Pleasant, SC, for John O Conlon, Toi Ahrens Estes, Cindy M Floyd, Ruth C Glover, A D Jordan, Timothy Scott, Curtis E. Bostic.

Lucas C. Padgett, Jr., Bernard Eugene Ferrara, Jr., Joseph Dawson, III, Charleston County Legal Department, N Charleston, SC, Samuel W Howell, IV, Howell and Linkous, Mt Pleasant, SC, for Barrett S. Lawrimore, Leon E. Stavrinakis, Charles Wallace.

Mikell Ross Scarborough, Charleston, Bernard Eugene Ferrara, Jr., Joseph Dawson, III, Charleston County Legal Department, N Charleston, SC, Samuel W Howell, IV, Howell and Linkous, Mt Pleasant, SC, for Charleston County Election Commission.

ORDER

DUFFY, District Judge.

**1 This matter was tried without a jury beginning on July 15, 2002. The United States has alleged that the at-large method of electing the nine-member Charleston County Council violates Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 ("Section 2"), because it results in the unlawful dilution of minority voting strength. The Court-having heard the arguments, read the submissions of counsel, and considered the evidence including court-room testimony, deposition testimony, and exhibits-enters judgment for the United States of America and partial judgment for Plaintiffs Moultrie, Freeman, McGill, and Flower based on the following findings of fact and conclusions of law.

As an initial matter it is important to clarify what this Order rigorously says about the at-large electoral system of Charleston County and what it unequivocally does *not* say

about her citizens. The Court recognizes that its decision does not merely operate mechanically against a political subdivision of the State of South Carolina but in fact against individual citizens whose lives in various measure are ***271** today changed. While the Court is otherwise disinclined to editorialize, those individuals, whether white or black,[1] who have had no voice in this debate but whose liberties are invariably altered by its resolution, deserve as clear and direct an explanation of this action as can be reasonably provided. There is a fundamental gravity to any decision of a federal court which calls into question actions taken by the people through the legislative process of their local and state communities. Federalism and separation of powers demand vigilant consideration.

With that said, this Order is radically not a condemnation of the citizenry of Charleston County but rather a recognition that the specific bulwark of an at-large system, in twisted concert with the particular geographic and historical realities of this County, unlawfully and institutionally inhibit a community of voters in Charleston County from equal access to the electoral process. The United States Supreme Court

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[1] In pursuit of a decision that is not only objective in fact, but objective by all appearances, the Court has given thoughtful consideration to the appropriate way to identify the respective races. Unfortunately, labels are inherently pregnant of connotation, and generally inadequate in their ability to characterize an entire group of people whose cultural, physical, and progenital commonality are a spectrum of attributes rather than a discrete set of qualities. The United States Census Bureau uses both the terms "black" and "African-American." Although the phrase "African-American" is likely under-representative for its failure to encompass fully the heritage of each member in the relevant community, it is seemingly preferable to the increasingly arcane pairing of "black and white," which generally fails to be either accurate or discreet. The Court will therefore predominately employ the phrase African-American going forward.

has made it clear that the "essence of a § 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause inequality in the opportunities enjoyed by black and white voters to elect preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In other words, a violation of Section 2 may arise from the structure of the electoral process itself plus the effects of *past* discrimination without regard to any *present* discriminatory intent. This case is one such instance.

Undoubtedly there are bigots among us, and while their stories uncomfortably texture the four corners of the Court's decision, this Order is little about them. If the trial on the merits demonstrated anything, it is that Charleston County can celebrate a rich legacy of individuals selflessly working towards a true community among its many races. Notwithstanding, the current at-large system, as it exists in a county of this size, unlawfully exacerbates the disadvantaged political posture inherited by generations of African-Americans through centuries of institutional discrimination.

INTRODUCTION

Procedural History

****2** The United States brought this action on January 17, 2001.[2] The United ***272** States did not allege a violation of

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[2] As amended in 1982, Section 2 of the Voting Rights Act of 1965, provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

Section 2's intent standard.[3] Private plaintiffs, who are four citizens registered to vote in Charleston County elections, filed their suit on February 28, 2001, alleging that Charleston County's at-large method of election violates the results and intent standards of Section 2. The Court consolidated the two cases on April 6, 2001.

On March 5, 2002, the United States moved for partial summary judgment as to the three preconditions set forth by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25(1986). On March 29, 2002, the United States also moved to enjoin the County from holding elections for open seats on the Charleston County Council until a proper remedy could be implemented under Section 2. On April 1, 2002, the private Plaintiffs also filed motions for a partial summary judgment

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(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the [jurisdiction] are not equally open to participation by members of a class [protected by Section 2(a)] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. 42 U.S.C. § 1973 (emphasis added).

[3] Section 2 contains both a "results" standard and a prohibition against intentional racial discrimination in voting. Claims of intentional discrimination under Section 2 are assessed according to the standards applied to constitutional claims of intentional racial discrimination in voting. See Garza v. County of Los Angeles, 918 F.2d 763, 766 (9th Cir.1990) ("[T]he Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes.").

on the *Gingles* preconditions and for a preliminary injunction. On April 2, 2002, the Defendants moved for summary judgment on the third *Gingles* precondition and on the totality of circumstances.

Magistrate Judge Robert S. Carr heard oral argument on those motions on April 17, 2002. In a written Report and Recommendation dated April 26, 2002, Magistrate Judge Carr recommended that (1) the United States' Motion for Partial Summary Judgment on the *Gingles* preconditions be granted, (2) the Defendants' Motion for Partial Summary Judgment on the totality of the circumstances be denied, and (3) the United States' Motion for Preliminary Injunction be denied.

Defendants objected only to Magistrate Judge Carr's recommendation that partial summary judgment be granted the United States as to the third *Gingles* precondition. They did not object to the other recommendations, including those related to the first two *Gingles* preconditions or that an untimely affidavit filed by one of Defendants' expert witness, Dr. Ronald Weber, be stricken from these proceedings. The United States objected only to that portion of Magistrate Judge Carr's Report and Recommendation that concluded that the United States did not meet its burden of demonstrating that a preliminary injunction would serve the public interest.

On May 24, 2002, the Court denied the United States' Motion for Preliminary Injunction. In an Order dated July 10, 2002, the Court adopted Magistrate Judge Carr's Report and Recommendation *in toto* granting Plaintiffs' motion for summary judgment on the three *Gingles* preconditions. Both the Court's Order, dated July 10, 2002, granting Plaintiffs' motion for partial summary judgment and the Magistrate

Judge's Report are incorporated herein by specific reference.

***273** The trial in this case commenced on July 15, 2002, and concluded on August 16, 2002. On September 18, 2002 the Court denied the United States' renewed motion for preliminary injunction against the November 5, 2002 general election for positions on the Charleston County Council.

Jurisdiction and Standing

****3** The Court has subject matter jurisdiction over this action pursuant to 42 U.S.C. § 1973j, and 28 U.S.C. § § 1331 and 1345. The voting rights claims advanced by the United States in this action are premised solely upon Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

Pursuant to 42 U.S.C. § 1973j(d), "[w]henever any person has engaged ... in any act or practice prohibited by [Section 2] ... the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction ... or other order." Thus, the United States has standing to challenge Charleston County's at-large method of election for its County Council to protect the voting rights of the County's African-American citizens.[4]

Private Plaintiffs also have standing to pursue their claims. *See* *Wilson v. Minor*, 220 F.3d 1297, 1303 n. 11 (11th Cir.2000) (citing *United States v. Hays*, 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) and stating "the essential point remains that in order to have standing one

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[4] It is important to the analysis to remember that the Voting Rights Act does not require nor allow the Court to examine the merits or demerits of at-large voting versus single-member districts except as to how they may effect minority voting rights.

must reside in the area directly affected by the allegedly illegal voting scheme").

DISCUSSION: FINDINGS OF FACT and CONCLUSIONS OF LAW

I. Factual Background

Demographic Information and Statistical Background

Charleston County is the third most populous of South Carolina's 46 counties and has the second highest total number of African American residents. (U.S.Ex. 106.) According to the 2000 Census of Population, Charleston County has a total population of 309,969. (U.S.Ex. 107.) Of that total, 188,542 (60.8%) persons are white and 106,337 (34.3%) are African American; 15,090 (4.9%) are of other racial/ethnic descent. (Id.)[5] Charleston County's voting age population is 236,395, of whom 153,250 (64.8%) are white, 72,287 (30.6%) are African American, and 10,858 (4.6%) are of other racial/ethnic descent. (Id.)

According to the South Carolina Election Commission, as of November 2000:(1) 177,279 persons were registered to vote in Charleston County, 122,557 (69.1%) of whom were white and 54,722 (30.9%) of whom were nonwhite; and (2) 114,166 persons voted in the November 2000 general election, 82,395 (72.2%) of whom were white, and 31,771 (27.8%) of whom were nonwhite. (U.S.Ex. 44I.) African-

[5] The figures for the white and African-American total population and voting age population in this paragraph do not include Hispanics, who may be of any race, and people who are of two or more races. The persons in the other category include those of Hispanic, American Indian or Alaska Native, Asian, Hawaiian or Pacific Islander, and other descent, and persons of two or more races.

American voters participate at a lower rate in elections than white voters in Charleston *274 County. (Joint Ex. 2A at Tables 4-5; U.S. Ex. 14 at Table 4; U.S. Ex. 15 at Table 1.)

Charleston County encompasses a geographical area of 919 square miles, a significant portion of which is water, and includes the incorporated municipalities of Awendaw, Charleston, Folly Beach, Hollywood, Isle of Palms, James Island,[6] Town of Kiawah, Lincolnville, McClellanville, Meggett, Mount Pleasant, North Charleston, Ravenel, Town of Seabrook and Sullivan's Island.

II. *Method of Election for County Council*

The Charleston County Council governs Charleston County. (U.S. Am. Comp. ¶ 3; Am. Answer ¶ 3.) It is composed of nine members elected at-large in partisan elections to four-year, staggered terms. (U.S. Am. Comp. ¶ ¶ 4, 6; Am. Answer ¶ ¶ 3, 5.) Council members qualify from four residency districts in the following fashion: three members reside in the City of Charleston, three members reside in the area between the Ashley and Cooper rivers that is not in the City of Charleston, two members reside in the area west of the Ashley River that is not in the City of Charleston, and one member resides in the area east of the Cooper River. (U.S. Am. Comp. ¶ 6; Am. Answer ¶ 5.)

**4 The County's at-large method of election was created in 1969, and precleared by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[7] In 1989, Charleston County held a referendum on a

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[6] James Island's status as a town is presently in litigation.

[7] The Attorney General granted administrative preclearance to Charleston County's at-large method of election some four years after Section 5 was first enacted and before any at-large elections were held under that 1969

proposal to switch from at-large to single-member districts for the County Council. Supporters of at-large elections prevailed by a margin of 52 to 48 % in a referendum with a turnout of less than 13 %. The *Evening Post* editorialized that voting in the referendum was polarized along racial lines. (U.S. Ex. 16 at 24; Transcript of Record at 971 [hereafter "Tr. at __."]). Moreover, according to the United States' expert, Dr. Theodore Arrington, and the Defendants' expert, Dr. Ronald Weber, voting on the referendum was extremely polarized between white and African American voters: they agree that at least 98% of African-American voters voted "yes" on the referendum and at least 75% of the white voters voted "no." (U.S. Ex. 14 at 63-64; Joint Ex. 2C, at Ex. A thereto.)

Since 1970, 41 persons have been elected to the Charleston County Council, three of whom are African American: Lonnie Hamilton III, Marjorie Amos-Frazier, and Timothy Scott. (U.S.Ex. 30.) Scott is the only current African-American member of the Charleston County Council.

***275** Charleston County is one of only three South Carolina

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law. On its face, Section 5 of the Voting Rights Act specifically provides that a subsequent civil action can be filed challenging a voting standard, practice or procedure that has been precleared under Section 5: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure." 42 U.S.C. § 1973c. Thus, the United States may bring a Section 2 claim against a precleared voting practice alleging discriminatory intent or result. *See Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 334, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000). However, in this action, the United States, unlike the private Plaintiffs, does not allege that the at-large method of election was enacted in 1969 with a discriminatory intent.

counties that elects its entire county council at-large. (U.S. Am. Comp. ¶ 11; Am. Answer ¶ 6.) The other two counties, Hampton and Jasper, are rural counties with total populations of less than 22,000 residents in each county, and comprised of a close balance of African-American and white citizens. (U.S.Exs.78, 106.) Moreover, of the 35 South Carolina counties in which whites were a majority of the population according to the 2000 Census of Population, only one--Charleston County--continues to elect its entire county council at-large. (U.S.Ex. 106.)

III. General Overview of the Results Standard of Section 2

As amended in 1982, Section 2(a) of the Voting Rights Act prohibits in part any state or political subdivision from imposing or applying "any standard, practice, or procedure" which "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color [.]" 42 U.S.C. § 1973.

Section 2 prohibits all forms of voting discrimination that "result in the denial of equal access to any phase of the electoral process for minority group members." S.Rep. No. 97-417 at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207 (hereinafter "Senate Report"). As amended in 1982, Section 2 requires proof only of a discriminatory result, not of discriminatory intent. *Chisom v. Roemer*, 501 U.S. 380, 394, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991).[8] The essence

[8] In *Chisom*, the Supreme Court explained that "[u]nder the amended statute, proof of intent is no longer required to prove a Section 2 violation. Now plaintiffs can prevail under Section 2 by demonstrating that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race." *Chisom*, 501 U.S. at 394, 111 S.Ct. 2354.

of a Section 2 results-claim is that an "electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). While the results standard does not provide an assurance of success at the polls for minority preferred candidates, it does provide an assurance of a fair process. *Johnson v. De Grandy*, 512 U.S. 997, 1014, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994).

**5 Thus, Section 2 insures that minority voters are free from any election practice "which operate[s], designedly or otherwise" to deny them the same opportunity to participate in all phases of the political process as other citizens enjoy. Senate Report at 28. The critical question, therefore, is "whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Gingles*, 478 U.S. at 63, 106 S.Ct. 2752 (citations omitted). "[A]t-large voting in a multimember political unit," as exists in Charleston County, "may prevent minorities from electing representatives of their choice by diluting their voting strength," in violation of Section 2. *Collins v. City of Norfolk*, 883 F.2d 1232, 1236 (4th Cir.1989) (citing *Gingles*, 478 U.S. at 47-48, 106 S.Ct. 2752).

In *Gingles*, the Supreme Court established three preconditions that a plaintiff challenging an at-large election system under Section 2 must satisfy. "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *276 *Gingles*, 478 U.S. at 50, 106

S.Ct. 2752. "Second, the minority group must be able to show that it is politically cohesive." *Id.* at 51, 106 S.Ct. 2752. "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed ...--usually to defeat the minority's preferred candidate." *Id.*

Satisfaction of the three *Gingles* preconditions is necessary to establish a Section 2 claim, but it alone is not sufficient. *Johnson v. De Grandy*, 512 U.S. 997, 1011, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). The Court must also perform a "totality of circumstances" inquiry. The Supreme Court has looked to the Senate Report accompanying the 1982 extension of the Voting Rights Act for guidance as to the "nature of § 2 violations and [ ] the proof required to establish these violations." *Gingles*, 478 U.S. at 43, 106 S.Ct. 2752. The Senate Report outlines various factors the Court might consider in analyzing a Section 2 claim. The Senate Factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the Democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

****6** 5. the extent to which members of the minority group

in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Senate Report at 28-29 (footnotes omitted).

The Senate also recognized the following "[a]dditional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation":

- whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and]
- whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29 (footnotes omitted).

IV. Plaintiffs Have Established the Three *Gingles* Preconditions

As noted, this Court granted partial summary judgment for Plaintiffs on the three *Gingles* preconditions in its Order dated July 10, 2002. Accordingly, the Court reaffirms its findings that (1) the African-American population of Charleston County is sufficiently numerous and geographically compact to constitute a majority in at least one of nine single-member districts in an illustrative plan for Charleston ***277** County Council; (2) African-American voters in Charleston County are politically cohesive; and (3) candidates of choice of African-American voters in Charleston County Council contests are usually defeated as a

result of white bloc voting.

V. The Totality of the Circumstances Inquiry

Establishment of the *Gingles* preconditions presages Section 2 liability. Indeed, "it will be only the *very* unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances." *Teague v. Attala County*, 92 F.3d 283, 293 (5th Cir.1996) (citation omitted) (emphasis added).[9]

Plaintiffs need not prove any particular number of Senate factors or that a majority of them point "one way or the other." *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752 (citing Senate Report at 29). Nor must Plaintiffs demonstrate that white voters "demonstrate an unbending or unalterable hostility to whoever may be the minority group's representative of choice, but whether, as a practical matter, the usual result of the bloc voting that exists is the defeat of the minority-preferred candidate." *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1123 (3d

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[9] *Accord Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir.1995); *see Sanchez v. State of Colo.*, 97 F.3d 1303, 1310 (10th Cir.1996) (noting that establishment of *Gingles* preconditions "creates the inference the challenged practice is discriminatory"); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1390 (8th Cir.1995) (en banc) ("Satisfaction of the necessary *Gingles* preconditions carries a plaintiff a long way towards showing a Section 2 violation"); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1116 (3d Cir.1993) (holding that "it would be a highly unusual case in which a plaintiff successfully proved the existence of the three *Gingles* factors and still failed to establish a violation"); *cf. De Grandy*, 512 U.S. at 1012 n. 10, 114 S.Ct. 2647 (noting that Section 2 challenges to multimember districts, as is the case here, are likely to be easier plaintiffs' cases than challenges to electoral practices in single-member districts).

Cir.1993).

The Court will begin its totality of the circumstances consideration with the two Senate factors identified by the Supreme Court as most important: (1) the "extent to which minority group members have been elected to public office in the jurisdiction" and (2) the "extent to which voting in the elections of the state or political subdivision is racially polarized." *Gingles*, 478 U.S. at 48 n. 15, 106 S.Ct. 2752 (citing Senate Report at 28-29, U.S.C.C.A.N.1982, p. 206). If those factors are present, the other factors "are supportive of, but not essential to, a minority voter's claim." *Id.*

A. *The Extent of Racially Polarized Voting*

7 The Court will first consider the extent to which voting in Charleston County elections is racially polarized. The Supreme Court defines racially polarized voting as a " 'consistent relationship between [the] race of the voter and the way in which the voter votes,' or to put it differently, where 'black voters and white voters vote differently.' " *Gingles*, 478 U.S. at 53 n. 21, 106 S.Ct. 2752 (internal citations omitted); *see also Sanchez v. State of Colo.*, 97 F.3d 1303, 1312 (10th Cir.1996). Dr. Theodore Arrington, expert for the United States, found that out of 31 contested, County-Council elections studied from 1984 to 2000, voting was racially polarized 29 times (94%). (U.S. Ex. 14 at Table 13.) The findings of Defendants' own expert, Dr. Ronald Weber, also confirm that voting in Charleston County Council elections is severely and characteristically polarized along racial lines. In 25 of the 33 contested ***278 general elections, from 1988 to 2000, African-American and white

voters were polarized (75.8%).[10] (Joint Ex. 2B ¶ 7.) This pattern of racially polarized voting is perhaps most dramatically demonstrated by Dr. Weber's findings that, in general election contests for Charleston County Council with at least one African-American candidate, there was polarization between African-American and white voters 100% of the time.[11] (Id. at Figures 5-6.) Even in general election contests for Charleston County Council involving no African-American candidates, there was polarization between African-American and white voters 87.5% of the time. (Id.)

It cannot be overstated that such polarization has resulted in a legally significant quantum of defeats for minority-preferred candidates, as previously concluded by the Court in its Order dated July 10, 2002. (See also Joint Ex. 2A ¶ 53; Joint Ex. 2B at Figure 7.) It is this consistent defeat at the

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[10] A number of discrepancies exist in Dr. Weber's various reports concerning polarization in Charleston County Council elections. Importantly, however, Dr. Weber has universally found severe and legally significant voting polarization, notwithstanding any conclusions he may have concerning the *cause* of such polarization. Ultimately, the Court is particularly compelled by the careful report prepared by Dr. Arrington.

[11] The Fourth Circuit, in *dicta,* has suggested that contests involving African-American candidates may in fact be more probative of *racial polarization* than elections without an African-American candidate. *Lewis v. Alamance County*, 99 F.3d 600, 610 n. 8 (4th Cir.1996). The Fourth Circuit, however, has clearly cautioned that such elections cannot necessarily be afforded greater weight when considering whether "because of that polarization, minority-preferred candidates are *usually* defeated." *Id.* The holding in *Alamance* is predicated on the obvious understanding that white candidates may in fact represent the candidate of choice of the minority community. To that end, this Court has remained guarded, and only focuses particularly on elections involving African-American candidates for the issue of *voting polarization.*

polls that makes such egregious polarization ultimately relevant. *See* Gingles, 478 U.S. at 56, 106 S.Ct. 2752. "[W]here minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Id.* at 48, 106 S.Ct. 2752.

The Court concludes that this evidence of significant and pervasive polarization militates strongly in favor of finding a Section 2 violation.

B. *The Extent to Which African-American Persons Have Been Elected to Public Office*

The second most important Senate factor is the extent to which African-American persons have been elected to public office in the jurisdiction. As discussed above, of the 41 persons elected to the Charleston County Council since 1970,[12] just three (7.41%) have been African American: Lonnie Hamilton III, Marjorie Amos-Frazier[13] and Timothy

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[12] No African Americans were elected to the Charleston County Council before 1970.

[13] It should be noted that Hamilton won 6 elections between 1974 and 1990. Amos-Frazier won in both 1974 and 1978. Notwithstanding the tenure of both Hamilton and Amos-Frazier, their successes remain the exception rather than the rule. First, as readily conceded by Dr. Weber, courts have found recent elections to be the most probative. (Joint Ex. 2A at 9-10); *see also* Ruiz v. City of Santa Maria, 160 F.3d 543, 555 (9th Cir.1998); Uno v. City of Holyoke, 72 F.3d 973, 990 (1st Cir.1995); Meek v. Metro. Dade County, Fla., 985 F.2d 1471, 1482-83 (11th Cir.1993). The question of vote dilution must be measured in the present, not the past, tense. Uno, 72 F.3d at 990. For example, if there was no racially polarized voting in a jurisdiction since 1984, the existence of racially polarized voting in the 1970s would not be relevant. Indeed, Dr. Weber specifically declined to analyze pre-1988 elections in his reports because of their negligible relevance. (Joint Ex. 2A at 9-10.)

Scott. ***279** (U.S.Ex. 30.) Of those three, Timothy Scott is emphatically not the candidate of choice of the county's

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Accordingly, whatever successes Hamilton and Amos-Frazier had in the 1970s and 1980s is of marginal relevance to whether African Americans *presently* enjoy equal access to the electoral process.

Moreover, the Court received compelling evidence that the electoral successes of Hamilton and Amos-Frazier, notwithstanding the obvious and remarkable qualities of the candidates themselves, were due, in large measure, to the coalition building that was characteristic of Democratic Party politics in Charleston County throughout the 1970's. (See, e.g., Tr. at 679-83.)

Defendants contend that it is actually the effectiveness of these biracial coalitions in the 1970s that demonstrates that African-American candidates could win today if only they sought to build similar relationships. Specifically, Defendants point to the effective coalition between African-American Democrat Amos-Frazier and the white Democrat Jimmy Stuckey. (Tr. at 679-83.) The Record suggests otherwise. The Court received testimony from both Amos-Frazier and Judge Bernard Fielding that the political environment of today is significantly different from that of the 1970s. (See Tr. at 133 (Fielding); 659-60; 660-65 (Amos-Frazier).) Amos-Frazier testified that her situation in the 1970s was unique in that Bill Ackerman, a white lawyer and politician, paid her to run his Charleston mayoral campaign in 1971, paid her to run the Alliance of Concerned Citizens for Better Government thereafter, and then partnered her with Jimmy Stuckey in the 1974 election. (Tr. at 639, 643, 665, 666, 2536.) Importantly, Amos-Frazier testified that she would not run for County Council today if she was the same age as she was in 1974 because she does not believe she could win, (Tr. at 659-60), expressly stating that she believed that the white community in Charleston County is different today than it was in the 1970s, (Tr. at 660-65).

There is also evidence that contemporary efforts to build biracial coalitions have been undermined by significant "white flight" from the Democratic Party in Charleston County since the 1970s. (Tr. at 2539.) Reasons for this flight include the Democratic Party's position on civil rights, (Tr. at 229).

African-American voters.[14] Although independently the elections of Hamilton, Scott, and Amos-Frazier are important stories of electoral success for minority candidates, they nonetheless represent a facially inadequate quantum of endogenous success among African-American candidates.

**8 Moreover, in all elections exogenous to the county-council races, African-American candidates have fared no better. The following represents the entire universe of African-American-candidate electoral success in all other exogenous, at-large elections within the jurisdiction:

- five African-American members of the nine-member Charleston County School Board, elected in the November 1998 General Election. The expert for the United States, Ted Arrington, agreed that all five of these individuals are African-American-preferred candidates (Tr.at 356).
- County Probate Judge Bernard Fielding, an African-American, who ran countywide as a Democratic candidate in the November 1990 General Election and was elected.
- Hollywood Mayor Herbert Gadson, who is African American.
- Awendaw Mayor William Alston, who is African American.

*280 • Lincolnville Mayor Tyrone Aiken, who is African American.

- Former State Senator and State Representative Herbert

[14] According to Dr. Weber, Scott has never been preferred by minority voters in any of his three elections to Charleston County Council. Indeed, according to Dr. Weber, Scott received an estimated 30.7% support from nonwhite voters in a 1995 special election. Thereafter, Scott's African-American support tumbled. Just two years later, Scott received an estimated 7.0% support from nonwhite voters in a 1997 special election, and he fared even worse in the 2000 general election, when he received an estimated 2.8% of the votes cast by nonwhite voters. (Joint Ex. 2A, Ex. E thereto, at 13, 23; Joint Ex. 2C, Ex. A thereto, at 4.) Scott ran as a Republican.

Ulysses Fielding, an African American, who ran at large as a Democratic candidate for the South Carolina House of Representatives in 1970 and was elected in that at-large election.

• Charleston City Councilman Louis Waring, an African American, who in 1990 ran at-large as a Democratic candidate for St. Andrews Public Service District Commissioner, and was elected in that special purpose district with a majority white voting age population.

• Mount Pleasant Council member Thomasina Stokes-Marshall, an African American, who ran at-large for and won a seat on the Town Council of Mount Pleasant, a municipality with a nine percent African-American voting age population.

Notably, in Charleston County's entire history, the aforementioned Judge Bernard Fielding, is the only African-American candidate to have ever won a countywide election for any of the seven single-seat offices: probate judge, sheriff, clerk of court, coroner, treasurer, register mesne conveyance and auditor. (Tr. at 101-02, 183-84.) Even still, after his November 1990 election victory to the office of Charleston County Probate Judge, Judge Fielding was not sworn in until the following August of 1991 and only after the South Carolina Supreme Court's unanimous ruling that rejected an election contest by his opponent. (Tr. at 99-101; *see Fielding v. South Carolina Election Comm'n*, 305 S.C. 313, 408 S.E.2d 232 (1991).)[15]

[15] Although African-American persons have been elected to the South Carolina House and Senate, the City of Charleston City Council, and other local offices, virtually all were elected from single-member, majority-African-American voting districts. Indeed, none of the statistical experts analyzed these exogenous elections.

Evidence of African-American candidate success in school board elections is also of dubious consequence. As stated, following the November 1998 General Election, the Charleston County School Board was comprised of five African-American trustees and four white trustees.[16] However, the Record demonstrates that the success of some African-American, school-board candidates is attributable to special circumstances unique to the school board elections. To wit, two of the five current African-American members were elected in contests where there were fewer white candidates than seats contested: in 1998, Oliver Addison was elected in a contest ***281** with no white candidates, and in 2000, Hillary Douglas was elected in a two-seat contest where there were only two white candidates on the ballot, one of which withdrew publicly one month before the election. (U.S. Ex. 23; Tr. at 323-24, 413, 578.) There is sufficient evidence to conclude that two of the other African-

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[16] Because the School Board elections are non-partisan, Defendants have attempted to use them as a "control" for "race" in identifying the cause of polarization in Charleston County voting. They contend that the success of African-American candidates in the non-partisan school board elections demonstrates that partisanship, and not race, explains the County's polarized voting patterns, because without the partisan "cues" of the county council elections African Americans experience greater success in school board elections. However, Dr. Arrington testified that polarization in school board races, in fact, closely mirrors that found in the county council elections, (Tr. at 412 (testifying that whites had never "favored" an African-American candidate and vice versa, and describing the voting as being along "racial lines")), and to the extent such polarization results in fewer defeats of minority-preferred candidates than in county council elections, the special circumstances discussed *infra* adequately account for such discrepancies. (But see Joint Ex. 2B at Figure 15) (finding, by Dr. Weber, that polarization occurred in School Board races only 12% of the time.)

It should also be noted that as a result of the 2002 elections the School Board has only one African-American member.

American school board members (Lewis, Ketchen-Simpkins) ran against multiple white opponents and won because the white vote was split among the white candidates. (U.S. Ex. 23, Tr. at 333-34, 413). Indeed, Douglas's contest--a two seat contest with only one white candidate that had not withdrawn--was the only black-white School Board contest from 1990 to the present where an African-American candidate would have been elected if only white voters had voted.[17] (U.S. Exs. 23 and 25.) Dr. Weber found that in some of the school board races, African-American voters had participated in single-shot voting.[18] (Tr. at 2129, 2136.) He

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[17] Defendants' expert Dr. Moore testified that the election of five African Americans to the County's nine member school board demonstrates the ability of the African American community to impact the electoral process and select candidates. (Tr. at 2890.) On cross-examination, however, Dr. Moore conceded that comparing School Board elections and County Council elections are like comparing "apples and oranges," (Tr. at 2988), and that he could not know how much significance, if any, to attach in this case to school board elections without analyzing the election data, which he did not do, (Tr. at 2994-96.)

[18] The United States Supreme Court has recognized the following description of single-shot ("bullet") voting:

" 'Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.' "

Gingles, 478 U.S. at 39 n. 5, 106 S.Ct. 2752 (quoting *City of Rome v. United States*, 446 U.S. 156, 184 n. 19, 100 S.Ct. 1548, 64 L.Ed.2d 119

also found that African-American school board candidates had won because the white vote was split among several white candidates, a phenomenon that does not occur in County Council races. (Tr. at 2140, 2142, 2145-46.) These special circumstances explain the contemporary and inordinate African American-candidate success that is out of balance with the characteristically poor results for African American candidates in all other jurisdictional elections.

****9** In sum, the United States has demonstrated that there has been only a disproportionately small number of African American persons ever elected to the Charleston County Council under the at-large method of election and throughout the jurisdiction. While the individual success of these African-American candidates in Charleston County is of immeasurable consequence to African Americans in Charleston County and the community at-large, they are an unfortunate and paltry offering for purposes of the Court's Section 2 inquiry.

Reinforcing the Court's consideration of the *Gingles* preconditions, the two most important Senate factors-the extent of racially polarized voting and the success of minority candidates in the jurisdiction-both weigh markedly in favor of a finding that ***282** African Americans suffer unequal access to the electoral process.

Although "supportive of, but not essential to, a minority voter's claim," *Gingles*, 478 U.S. at 48 n. 15, 106 S.Ct. 2752, the Court considers the following additional Senate Factors.

C. *The extent to which members of the minority group in*

(1980), (quoting United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206-07 (1975))).

the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.

The Court is next concerned with the extent to which African Americans in Charleston County "bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." S.Rep. No. 97-417, 97th Cong.2d Sess. 28, 29 (1992). This factor is satisfied when the plaintiffs can show (1) "disproportionate educational, employment, income level and living conditions arising from past discrimination" and (2) a depressed level of minority participation in politics. *Id.* at 29 & n. 114. Importantly, Plaintiffs do not have to prove a causal nexus between the two:

> The Courts have recognized that disproportionate educational employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

Id. (citations omitted); *see also* *Teague v. Attala County, Miss.*, 92 F.3d 283, 294 (5th Cir.1996); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 866 (5th Cir.1993). The United States Supreme Court has recognized that inequalities in education, employment, income level and living conditions that arise from past racial discrimination have a deleterious tendency to hinder minority political participation. *White v. Regester*, 412 U.S. 755, 768, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

1. Disproportionate education, employment, income level, and living conditions arising from past discrimination.

**10 It is plain that African Americans have suffered a pronounced and protracted history of past discrimination. The Court briefly recounts particular indiscretions not for their emotive features but for their necessary place in the totality of the inquiry required by Section 2. The focus, however, will ultimately remain on the present disproportionality in education, employment, income, and living conditions between African Americans and whites resulting from such discrimination and whether African Americans participate politically at depressed levels.

During the first half of the twentieth century, African-American citizens in Charleston, as in other areas of South Carolina, were subject to segregation laws which had a discriminatory effect on most aspects of their lives. (U.S. Ex. 11 at 1; U.S. Ex. 16 at 5, 7-8; Tr. at 928.) Among the public institutions most important to future participation in the political process is education. Charleston County's segregated facilities for African Americans were routinely inferior and the distribution of resources were greatly disparate. Per-pupil expenditures for public education, calculated separately for both African-American and white schools, provide a measure of discrimination in school quality *283 under segregation that is widely accepted by historians. (Tr. at 928-30.) In 1915, Charleston County schools spent five times as much for white pupils as for African Americans. (U.S. Ex. 16 at 6, quoting Louis Harlan, *Separate and Unequal: Public School Campaigns and Racism in the Southern Seaboard States, 1901-1915* 185 (1968); Tr. at 929.) In the 1930s, expenditures for white students were four times those for African-American

students; by the end of the 1940s, the ratio was roughly two to one in favor of white pupils. (U.S. Ex. 16 at 44, App.) Even as late as the 1958-1959 school year, per-pupil expenditures favored whites by a ratio of 1.3 to one. (Id; Tr. at 929.) These deficiencies have greatly diminished the educational capital inherited by the present generation of African Americans.

As in so many other communities, racial change did not come quickly or easily to Charleston County. When the United States Supreme Court decided *Brown v. Board of Education* in 1954, the Charleston *News and Courier* editorialized that it would lead to "the most radical upheaval since Reconstruction." (Quoted in Priv. Pls.' Ex. 1 at 16.) In its aftermath state and local officials made plans to maintain racial segregation by every legal means, and prominent white leaders organized local Citizens Councils to promote the unity of the white community behind the cause of segregation. Charleston had an active Citizens Council chapter in the 1950s under the leadership of a person subsequently elected to the Charleston County Council. (Priv. Pls.' Ex. 1 at 16, 41; Tr. at 1147, 1158-59, 1195, 2915.)

Prior to the enactment of Title 2 of the 1964 Civil Rights Act, facilities open to the public, such as restaurants, doctors' offices, buses, movie theaters, parks and beaches, were segregated along racial lines. (Tr. at 1285- 86, 1287, 1432-34, 1921.) As described by former Charleston County Probate Judge Bernard Fielding, the county during the period before the passage of the 1964 Civil Rights Act was "totally segregated." (Tr. at 88-89.)

****11** Desegregation came to Charleston County, as to the rest of the South, largely as a result of federal court orders.

Initially, however, state and local officials sometimes closed facilities rather than eliminate racial segregation. In 1934, an enactment of the South Carolina Legislature which applied only to Charleston County made it a crime for African Americans and whites to use the same recreational facilities. When African-American citizens filed a lawsuit challenging the racial segregation of facilities at Edisto Beach State Park in Charleston County, the State Commission of Forestry closed the park to all citizens. *Clark v. Flory*, 141 F.Supp. 248 (E.D.S.C.1956). The park was closed until 1966. (Priv. Pls.' Ex. 1 at 17; Tr. at 708.) The law was not repealed until 1977. 1977 S.C. Acts 306.

Over time, however, officials began to accede to court orders, rather than eliminate public services. The successful desegregation of Charleston's municipal golf course in 1961, for example, resulted from the decision of city officials to comply with a federal court order in *Cummings v. City of Charleston*, 288 F.2d 817 (4th Cir.1961).

In 1961, the South Carolina Supreme Court upheld the constitutionality of the state's trespass-after-notice law and affirmed the convictions of 24 African-American citizens who refused to leave the lunch counter at the S.H. Kress Store in Charleston County. *City of Charleston v. Mitchell*, 239 S.C. 376, 123 S.E.2d 512 (1961). The United States Supreme Court reversed the decision by the South Carolina Supreme Court in *City of Charleston v. Mitchell*, 239 S.C. 376, 123 S.E.2d 512 (1961), on the grounds that enforcement of ***284** the state's anti-trespass law had taken place in such a way as to violate the constitutional rights of the African-American citizens prosecuted in the City of Charleston. *Bouie v. City of Columbia*, 378 U.S. 347, 349, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

Racially discriminatory employment practices, in the private and public sectors, further disadvantaged African Americans economically. (Tr. at 930- 32.) Before civil rights demonstrations took place in the City of Charleston in 1963, virtually all business establishments in Charleston County were racially segregated and did not provide equal pay for equal work for all employees. (U.S. Ex. 11 at 7; Tr. at 635-36.) By July 4, 1963, over 500 African-American civil rights demonstrators had been arrested; 229 of them had already been tried and convicted. (Priv. Pls.' Ex. 1 at 18-19.) As a result of demonstrations, some business establishments in downtown Charleston agreed to serve customers of both races on an equal basis. (U.S. Ex. 11 at 7.) Substantial desegregation throughout Charleston County awaited implementation of the 1964 Civil Rights Act.

Until August 1963, the school system of District 20 in Charleston County was completely segregated by race.[19] *Brown v. School District No. 20*, 226 F.Supp. 819, 826 (E.D.S.C.1963); (Tr. at 90, 813, 1359-61, 1429.) In August, 1963, a federal court ordered the admission of eleven African-American students to previously all-white schools in Charleston and enjoined the local school board from refusing admission, assignment, or transfer of any other African-American child, on the basis of race or color, to attend any public school operated by the school district. *Brown*, 226 F.Supp. at 827.

**12 Rather than send their children to racially integrated public schools, many white parents chose to have them attend private schools, some of which were organized in the aftermath of public school desegregation. (Tr. at 936- 37;

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[19] The parent/teacher associations remained racially segregated until the late 1960s. (Tr. at 558, 1359-61.)

U.S. Ex. 16 at 13-14.) The then-President of a local college and later a member of the state legislature, helped found an all-white preparatory school at the college, resisted desegregation of the college itself, and gave public speeches opposing racial integration. (Priv. Pls.' Ex. 1 at 43.) Financial assistance to parents enrolling their children in private schools was provided in some instances through the state's tuition grant program. (Priv. Pls.' Ex. 1 at 19.) As late as 1966, only 185 African-American students were attending desegregated schools in Charleston County. (U.S. Ex. 16 at 13-14; Priv. Pls.' Ex. 1 at 19, 43-44.)

The Charleston County Bar Association was not open to black attorneys until the late 1960s. (Tr. at 87, 89.) As late as 1972, the women's section of the Charleston County Jail was segregated. (Tr. at 650.)

The discriminatory impact of Charleston County's system of racial segregation is reflected in census data throughout the 20th century. According to the 1950 Census of Population, the median income for African-American families in Charleston County was $672, roughly one third of the median income for white families ($2,007). (Priv. Pls.' Ex. 1 at 12.) The percentage of non-white unemployed (13.9 % for males, 10.8 % for females) was far higher than among whites, where only 4.4 % of males and 2.7 % of females were listed as unemployed. (Id.) Only 3 % of white households ***285** had no running water, compared with 27.5 % of non-white households. (Id.) Among white households, only 12.8 % had no indoor toilets, as compared with 73 % of non-white households. (Id.)

This pattern of socio-economic disparity has continued to characterize Charleston County during the latter part of the 20th Century. (Tr. at 933, 1182-84.) According to the 1980

Census, median income for African-American families ($10,907) was still only half that of white families ($20,400) in Charleston County, and 32.2 % of African-American families lived below the poverty level, as compared with only 6.1 % of white families. Unemployment figures reflected the same sort of disparities: 10.9 % of African-Americans but only 3 7 % of whites were unemployed. (Priv. Pls.' Ex. 1 at 13.)

According to the 1990 Census, which was the most recently available socio-economic census data at the time of trial, socio-economic disparities continue to divide white and African-American residents of Charleston County.[20] Such differences, as shown in the following table, are dramatic:

Comparison of Socio-Economic Status
of Blacks and Whites in Charleston
County by 1990 Census
(income data for 1989)

Socio-Economic Indicator	Whites	Blacks
Education:		

[20] Data from the prior decennial census is presumed accurate unless contradicted by clear, cogent, and convincing evidence. *Johnson v. De Soto County Bd. of Comm'rs*, 204 F.3d 1335, 1341 (11th Cir.2000); *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir.1999).

Percent completed less than 5th grade	1.0%	6.6%
Percent high school graduate	83.6%	57.6%
Percent completed some college	58.0%	30.1%
Percent completed bachelor's degree	28.5%	8.8%
Income and employment:		
Percent unemployed	3.2%	9.8%
Median family income	$38,052	$18,603
Per capita income	$16,339	$7,106
Percent persons below poverty level	7.9%	34.2%
Percent families below poverty level	5.0%	31.3%

Percent persons below 125% of poverty level 10.6% 41.1%

Percent persons below 200% of poverty level 21.3% 60.3%

Percent persons with public assistance income 2.3% 16.9%

Nativity

Percent born in South Carolina 47.7% 86.1%

Percent born in other southern states 24.5% 6.8%

Total percent born in the South 72.2% 92.9%

**13 (U.S.Ex. 68D.) This socio-economic evidence is

uncontroverted. (See, e.g., Tr. at 2168-69.)[21]

Comparison of Socio-Economic Status of
Blacks and Whites in Charleston
County by 2000 Census
(income data for 1999)

Socio-Economic Indicator	Whites	Blacks
Education:		
Percent high school graduate	89.4%	65.3%
Percent completed some college	65.8.0%	35.3%
Percent completed bachelor's degree	40.2%	10.7%

[21] After this case was tried, much of the relevant 2000 Census data relating to socio-economic disparities was released. Plaintiffs have requested that the Court take judicial notice of this 2000 socio-economic data. The 2000 Census data demonstrates that the socio-economic differences between African Americans and whites in Charleston County have persisted. However, such evidence was unavailable for full adversarial treatment at trial and, therefore, will be infrequently employed.

Income and employment:		
Percent unemployed	3.9%	10.9%
Median family income	$60,195	$26,703
Per capita income	$26,956	$11,787
Percent persons below poverty level	8.6%	29.9%
Percent families below poverty level	4.2%	27.8%
Nativity		
Percent born in South Carolina	45.7%	84.2%
Percent born in other southern states	24.1%	6.8%

Total percent born in the South	69.8%	91.0%

***286** The depressed socio-economic status of African-American citizens of the County compared to white citizens is a legacy of the prolonged history of discrimination by Charleston County and South Carolina. (See U.S. Ex. 16 at 40-43; Tr. at 932-34, 1182-84.)[22] Significantly, Defendants' expert, Dr. William V. Moore, explicitly recognized, in his report and at trial, the causal relationship between past discrimination and present socio-economic levels: "African Americans suffered disproportionately under the old system, and *it does impact on their current socio-economic status in Charleston County,* in the State of South Carolina, and in the nation as a whole." (Defs.' Ex. 14(A) at 39 (emphasis added); Tr. at 2979.) Similarly, the United States' expert, Dr. Dan Carter, testified that Charleston County's history of official discrimination is a "heavy hand" that continues to impact African-American socio-economic status. (Tr. at 931-35, 981-82.)

Anecdotally, Charleston County Grants Administrator Evelyn DeLaine-Hart testified concerning the link between official discrimination and current socio-economic disparities between African Americans and whites in Charleston County. DeLaine-Hart testified that it is difficult

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[22] According to 1990 Census, 86.1% of the African-American residents of Charleston County were born in South Carolina. (U.S.Ex. 68D.)

to break out of the cycle of poverty because of problems that poor people encounter in areas such as education, child care, transportation, and health. Furthermore, she testified that she has observed poverty within families spanning generations, and that current socio-economic differences suffered by African-American people today are caused in part by past discrimination. (Tr. at 2655-58.)

The Court concludes that African Americans in Charleston County suffer disproportionally to white persons in education, employment, income level, and living conditions as a result of discrimination.[23]

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[23] In order to view fully the history of discrimination in Charleston County and its effect on present political participation, it is appropriate here, in conjunction with the fifth Senate factor, to also consider the first Senate factor: "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the Democratic process." (Senate Report at 28.) It is undisputed, that there has been a long history of official discrimination touching the right of African Americans to register, to vote, or otherwise to participate in the democratic process. Indeed, the County concedes that there has been a long history of official discrimination in Charleston County, touching the right of African Americans to vote. (See Defs.' Judicial Stip., filed March 5, 2002; Tr. at 2215-16.) By way of example, the South Carolina Constitution of 1895 included a literacy test, a poll tax, disfranchisement for certain enumerated crimes, and long residency requirements. *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 n. 9, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Certainly, such institutional discrimination contemporaneously resulted in significant disparities in the voter registration totals for African-American and white residents of Charleston County. In November 1964, the percentage of South Carolina white persons of voting age who were registered to vote was 75.7%, but only 37.3% of the African-American voting age population was registered to vote, a disparity of 38.4 percentage points. (U.S. Ex. 11 at 5.) In September 1967, according to an estimate published by the United States Commission on Civil Rights, the number of white persons registered to vote in South Carolina equaled 81.7% of the 1960 voting age population, as compared with only 51.2% among African Americans,

a disparity of 30.5 percentage points. (U.S. Ex. 11 at 8.) However, unlike the effect of past discrimination in areas of education, employment, and income, as considered under Senate factor 5, the Court cannot conclude that there remain lingering effects from past discrimination touching the right of African Americans to vote. At trial, the United States did put forward voluminous testimony concerning what it characterized as a consistent and more recent pattern of white persons acting to intimidate and harass African American voters at the polls during the 1980s and 1990s and even as late as the 2000 general election. So much of the United States's evidence was necessarily anecdotal and has, therefore, made it difficult to properly quantify the effect these incidents in isolation might have had, and continue to have, on the overall participation of African Americans in the electoral and political process. For that reason the Court finds the evidence less probative of whether there in fact exists a pattern of pervasive and *consequential* discrimination at the polls. Sadly, however, the Court agrees that there is significant evidence of intimidation and harassment and by a preponderance of the evidence makes the following findings. The Court, though, without more proof of effect, is loathe to impute the regrettable acts of a few on the County as a whole and ultimately gives such findings only marginal weight in the final analysis.

When she was first appointed to the Charleston County Election Commission in 1991, Carolyn Collins found that poll managers were assigned to the majority-African American precincts who caused confusion, intimidated African-American voters, and had the tendency to be condescending to those voters. (Tr. at 829-30; U.S. Ex. 94.) Collins observed this inappropriate behavior by white managers at majority-black precincts, including the behavior of a particular poll manager at the Joseph Floyd Manor Precinct during the 1996 election. (Tr. at 835-36, 882.) That poll manager had intimidated a number of black voters by his "threatening attitude." (Tr. at 838.) When Collins approached the poll manager and attempted to talk with him concerning his behavior at the polls, he informed her that he did not have to follow her instruction. (Tr. at 840.) Notwithstanding this behavior, that poll manager continued to work at the Joseph Floyd Manor Precinct during the 1996 election. (Tr. at 840.) Indeed, he continues to work as a poll manager at majority-African-American precincts in Charleston County. (Tr. at 847, 884, 888.)

During her service on the Election Commission, Collins also received complaints that poll managers interfered with certain African-American voters' right to receive assistance during the voting process from persons of their choosing. (Tr. at 841-43, 857-58, 864-65.) Section 208 of the Voting Rights Act provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 42 U.S.C. § 1973aa-6. This interference involved white poll managers suggesting that certain African-American voters did not need assistance. (Tr. at 841-44.) Indeed, Collins testified that she had received complaints from African-American voters concerning rude or inappropriate behavior by white poll officials in every election between 1992 and 2002. (Tr. at 845-46, 856; see also 2689.)

At trial, Collins stated that there continue to be problems regarding the treatment of African-American voters by some white poll managers, even though the Election Commission has provided training to poll managers on this subject. (Tr. at 887.)

Charleston attorney F. Truett Nettles testified that he has been involved in Charleston County election activities for over 20 years, first as a poll watcher, later as Chairperson of the Charleston County Election Commission, and then again as a poll watcher. (Tr. at 457, 458, 474.) Poll watchers are not employed by the Election Commission. They work on behalf of candidates or political parties. Poll managers, on the other hand, are persons appointed by the Election Commission to conduct the elections. The Election Commission pays poll managers to setup the books, operate the voting machines and count the votes in polling places on election day. (Tr. at 457.)

From 1980 until his appointment as Election Commission chairperson in 1992, Nettles served as a poll watcher assigned on most occasions to predominantly African-American polling sites. (Tr. at 458.) Nettles served on a team of 10-20 lawyers sent to predominantly African-American polling places to help prevent and, when necessary, remedy instances of harassment and intimidation of African-American voters by white poll officials. (Tr. at 458-60.)

Nettles testified that, from 1980 through 2000, "[e]very time, every election we would have controversies in African-American precincts

about voter assistance, or just the way voters are treated when they vote." (Tr. at 473.) Several white poll managers--including a future chairperson of the Election Commission--were routinely appointed as poll managers by the Election Commission and assigned to predominantly African-American polling places in Charleston County, where they intimidated and harassed African-American voters. (Tr. at 460-64, 469-71.)

Specifically, Nettles testified that the Election Commission routinely assigned one particularly problematic poll manager to predominantly African-American polling places in different parts of the County during the 1980s and early 1990s. (Id.) At the polls, this poll manager, who is white, routinely approached elderly African-American women seeking to vote and spoke in a loud and condescending voice that called undue attention to these voters and needlessly disrupted the voting process. (Tr. at 460-61, 463.) As described by Nettles, the poll manager would approach these women as soon as they entered the polling place and "make a scene and be real-- speak loudly, and he would put his arm around them and tell them, 'Don't be afraid, everything's going to be all right.' And the voters did not want that special attention. They just wanted to come in and sign up and vote. And it happened repeatedly just to that class of voter." (Tr. at 460-61). There is testimony that this poll manager's unsolicited interference embarrassed, harassed and intimidated African-American voters. (Tr. at 461.)

This same poll manager's conduct further denied some voters the right to have voting assistance from an assistor of choice. According to uncontradicted testimony, he would approach African-American voters who had properly selected someone to help them vote and, proclaiming loudly, "Oh, you don't need that assistance, I'll help you, I'll take care of you [,]" deny the voter the assistor he or she selected. (Tr. at 462.) The poll manager's conduct toward elderly African-American voters was a "recurring problem." (Tr. at 467, 2460, 2472, 2474.) According to Charleston County Election Commission attorney, Joseph Mendelsohn, the poll manager's behavior at predominantly-African-American precincts was designed to intimidate or cause problems for African-American voters. (Tr. at 2473.) Indeed, this poll manager's ongoing interference with African-American voters in Charleston County polling places prompted a Charleston County Circuit Court to issue a restraining order against the Election Commission requiring its agents to cease interfering with the voting process. That restraining order arose directly from this poll manager's conduct toward African-American voters. (Tr.

at 466; see U.S. Ex. 2.) After his misconduct was brought to the attention of the Election Commission, it had some difficulty removing him from his position as election manager. (Tr. at 2479.)

Nettles also provided additional uncontradicted testimony about intimidating and harassing conduct by other poll managers aimed at African-American voters seeking voting assistance. For instance, Nettles testified that white poll managers in predominantly African-American polling places would "give the third degree" to African-American voters requesting voting assistance by asking questions such as: "Why do you need assistance? Why can't--can't you read and write? And didn't you just sign in? And you know how to spell your name, why can't you just vote by yourself? And do you really need voter assistance?" (Tr. at 469.)

Poll managers engaged in such conduct included one individual who has recently served as chairperson of the Charleston County Election Commission. Such public and hostile questioning upset and humiliated some African-American voters. (Tr. at 470-71.) This conduct occurred despite the Election Commission's explicit instructions to poll managers that voting assistance should be permitted unimpeded absent affirmative evidence of fraud. (Tr. at 485-86; see Tr. at 2417.) These instructions were based, in part, on the Election Commission attorney's interpretation of federal law regarding the right to voting assistance. (Tr. at 485-86; see Tr. at 2456-58, 2484-85, 2491-92, 2504.)

Conversely, Nettles testified that, based on his observations, white voters needing voting assistance at predominantly African-American polling sites were permitted their assistor of choice without challenge. (Tr. at 471-72, 473.) Moreover, no evidence exists of any instances of harassment, intimidation, or interference directed against white or African-American voters at predominantly white polling places. (Tr. at 473-74.)

African-American voters also endured improper interference from white poll *watchers,* as distinguished from poll managers, who directly confronted some African-American voters requesting assistance with questions such as: "Why do you need assistance, don't you know how to read? You can vote without assistance, you don't qualify." (Tr. at 484-85.) Such poll worker conduct prompted Election Commission action to remedy these ongoing problems. (Id.; U.S. Ex. 106.)

North Charleston Mayor Keith Summey served as Charleston County Election Commission Chairperson from 1978 through 1986, the last four years serving as its Chairperson. (Tr. at 2379, 2380, 2384.) Mayor Summey testified that controversies involving white poll workers and African-American voters were routine during his time on the Election Commission. (Tr. at 2417- 2418.) In general, African-American voters complained that white poll managers and poll watchers regularly interfered with those African-American voters' right to receive assistance while voting in predominantly African-American precincts. (Tr. at 2420.) Such activities intimidated some African-American voters, (Tr. at 2419), requiring the Election Commission to remove poll managers and/or poll watchers in predominantly African-American precincts on John's Island, Wadmalaw and other Sea Island precincts, (Tr. at 2420-21.) And while white poll managers complained that African-American voters sought to vote improperly, Mayor Summey never once found merit to any such allegations. (Tr. at 2418, 2443-44.)

Charleston County Council candidate Rosemarie West testified that in "[a]lmost every election" she observed African-American voters being treated rudely and talked to harshly at the polls. (Tr. at 1346, 1353.)

In the 1990 election, a member of the Charleston County Election Commission and others participated in a Ballot Security Group that sought to prevent African-American voters from seeking assistance in casting their ballots. (Tr. at 1594-96.) One of the other members of the Ballot Security Group was the aforementioned and particularly problematic poll manager assigned by the Election Commission to work in the Hollywood precinct. (Tr. at 1596-97.) He was removed from the Hollywood precinct because of his efforts to deny African-American voters their right to have election assistance from the person of their choice. (Tr. at 1598, 1615.)

Moreover, in the 1980 election, the *News and Courier* reported that some college students, claiming that they were federal poll watchers, intimidated some voters at the Fraser Elementary School, a predominantly African-American precinct in the City of Charleston's East Side. The students threatened to "lock up" voters. (U.S.Ex. 3.)

And while the Defendants suggest that such instances of harassment of and intimidation against African-American voters were attributable

solely to partisan politics and not race, the uncontroverted testimony establishes that such conduct never occurred at predominantly white polling places, including those that tended to support Democratic candidates. (Tr. at 529- 30 ("My experience is that the bulldogs, we might call them, were sent to the African-American precincts.").) Moreover, to the extent that these intimidating and harassing acts were prompted by partisan zeal, their impact is undeniably racial.

The Court expresses particular concern over two recent episodes of racial discrimination against African-American citizens attempting to participate in the local political process. First, Charleston County Council reduced the salary for the Charleston County Probate Judge in 1991, following the election of the first and only African-American person elected to that position. When he retired in 1990, Probate Judge Gus Pearlman, a white person, was receiving a salary of approximately $85,000 per year. During the period from the retirement of Judge Pearlman to the swearing in of his newly-elected successor, Bernard Fielding, an African-American person, the white Clerk of Court served as interim probate judge and received an $85,000 salary. (Tr. at 193.) At that time Bernard Fielding was completing his 16th year as Associate Probate Judge and earned $68,000 per year. After Judge Fielding was sworn in August 1991, the County Council reduced the salary of the Charleston County Probate Judge by $26,000 to $59,000 per year. Therefore, upon being elected the first and only African-American person to serve as the County's Probate Judge, Judge Fielding's move from associate probate judge to probate judge resulted in his salary being reduced by $8,000. (Tr. at 102-04.) Section 8-21- 765(A)(1) of the South Carolina Code established a minimum schedule salary for counties that had at least 200,000 residents. (Tr. at 170.) Thus, South Carolina law did not require Judge Fielding's salary to be reduced to the $59,000 level. This is the same judge whose election was upheld by the South Carolina Supreme Court and who was still forced to seek the Justice Department's intervention to be sworn into office.

Second, after the 2000 Charleston County School Board elections, for the first time in the history of the County, five of the nine school board members were African-American persons. (Tr. at 566-67.) After African-American school board members became a majority on that governing body, the Charleston County Legislative Delegation to the South Carolina General Assembly sponsored several pieces of legislation to alter the method of election for the school board in Charleston County.

***290 2. Political Participation**

Having found that African Americans suffer disproportionately in areas of education, employment, and living conditions, the Court next considers whether, as a result of such depressed socio-economic levels, African Americans participate politically at a lower rate than white persons. Political scientists generally agree that persons with lower socio-economic and educational status tend to participate in the political process at lower rates and thus the history of economic disadvantage continues to have a racially discriminatory effect. (U.S. Ex. 16 at 42; Tr. at 934-35, 1183 ("Well, as I said, political scientists don't always agree, they sometimes disagree, but I can't find any disagreement with the notion that the rates of political participation, voter turnout, particularly, is directly related to income and education.").) In fact it is this social science understanding that informed Congress's determination that Plaintiffs need not prove that depressed socio-economic and educational status cause a finding of lower political participation. S.Rep. No. 97-417, 97th Cong.2d Sess. 28, 29

(Tr. at 568.) First, legislation was introduced that would have changed the method of election for the school board from non-partisan to partisan elections. (Tr. at 568.) Second, legislation was introduced to remove control of the budget of the school system from the School Board and place it under the jurisdiction of the County Council. (Tr. at 571.) Governor Hodges vetoed those enactments. (Id.) Prior to the introduction or consideration of these proposed bills effecting the method of election for the Charleston County School Board, none of the members of the local delegation contacted members of the majority-African-American School Board to seek their views on these electoral changes. (Tr. at 568, 570-73, 607.)

As stated, these findings are appropriate to the totality of the inquiry and are serious enough to warrant specific mention. Nonetheless under existing precedent the Court ultimately assigns them limited weight.

& n. 114 (1992); *see also* White v. Regester, 412 U.S. 755, 768, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

**14 The evidence establishes that African Americans in Charleston County participate at lower rates than do white persons. Plaintiff's expert, Dr. Arrington, and Defendants' expert, Dr. Weber, agree that African Americans register to vote at lower rates than whites, and African-American registered voters turn out at lower rates than white registered voters. (Tr. at 300-02; U.S. Ex. 15 at 23-24 & Table 1; Joint Ex. 2A at 24-31; Joint Ex. 2C at 7; see Tr. at 2974 (Dr. Moore acknowledging that white voter turnout at all age levels exceeds that of African-American turnout); Defs.' Ex. 14A at 40 (Table XXII).) The following table demonstrates the depressed levels of registration and turnout of African-American citizens, as compared to white citizens, in Charleston County between 1988 and 2000.

Rates at Which White Persons' Political Participation Exceeds That of African Americans in Charleston County 1988-2000

Year	Registration as Percentage of Voting Age Population	Turnout as Percentage of Voting Age Population	Turnout as a percentage of registration
1988	NA	NA	10.3%

1990	1.1%	5.3%	9.1%
1992	6.5%	9.4%	7.7%
1994	8.9%	11.8%	12.3%
1996	0.5%	8.0%	7.3%
1998	6.0%	4.9%	2.3%
2000	10.7%	13.5%	9.1%
Mean	5.6%	8.8%	8.3%

***291** (U.S. Ex. 15 at Table 1; see also Joint Ex. 2A at 26, 29 (Tables 4- 5)).

Although not grossly disproportionate, the Court concludes that African-American voter registration and turnout have been depressed to a meaningful degree as compared to that of whites. Notwithstanding the 1998 election when voter registration and turnout were comparable, the disparity between the races in registration and turnout consistently approached double-digit percentiles.

Beyond the statistical evidence that African Americans participate at a lower rate than white persons, the Court received competent testimony that political participation is further impaired by the effect socio-economic disparities have on African-American access to important sources of financial and political power in Charleston County.

It is no secret that Charleston County continues to be separated along racial lines in its social, civic, and religious activities. (*See, e.g.,* Tr. at 189- 90, 219-20, 556-57, 733, 816, 1379, 1495-1505, 1934, 2328.) This stratification is a direct holdover from more institutional discrimination and segregation and hinders the ability of African-American candidates to solicit the support of white citizens.[24] (See, e.g., Tr. at 125-26.) The on-going racial separation that exists in Charleston County--socially, economically, religiously, in housing and business patterns--makes it especially difficult for African-American candidates seeking county-wide office to reach out to and communicate with the predominantly white electorate from whom they must obtain substantial support to win an at-large elections. (See, e.g., Tr. at 1434, 1443.)

**15 The evidence indicated that the membership of many

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[24] For these purposes, it is not important whether this racial separation is the result of acts that violate law, or whether they result from private behavior that is not regulated by law. What is important is the fact that members of the Charleston County community live social, economic and religious lives that many times do not result in members of one race having the opportunity to know members of another race, and the impact this racial separation has as a practical matter on the "past and present reality" of political life in Charleston County. Senate Report at 30 (quoting *White v. Regester*, 412 U.S. 755, 769-70, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)). This racial separation evidence is an additional indication of the importance of race in Charleston County Council elections.

social and civic organizations in the County is made up of one race or is nearly all-white or nearly all-African-American. (Tr. at 219-20, 556-57, 662, 680-81, 1867-68, 2538-39.) Some prominent African-American citizens of the County testified that they had never been asked to join a predominately white social or civic organization in Charleston County even though these individuals were active in the social and civic organizations in the county's African-American community. (Tr. at 113-14, 190-91, 1452.) One of these individuals, Bernard Fielding, the former Associate Probate Judge and Probate Judge of the County, a graduate of Boston University Law School, and a local attorney and business owner since the 1950s, (Tr. at 84-85, 91), testified that he has never been invited to join any predominantly-white social or civic organizations, (Tr. at 113-114). Similarly, former State House member and State Senator, McKinley Washington, a public servant for almost 30 years, testified that he has never been asked to join a predominately white civic club such as the Rotary or Elks clubs. (Tr. at 727.)

***292** These social and civic organizations are obviously important bases of financial and political power typically targeted by political candidates, including those running for County Council, (see, e.g., Tr. at 215, 219, 245). Personal contacts with individuals and organizations are one of the most important factors in running for County Council. (See Tr. at 214, 732, 784-85, 2547-48.) Many times the people who contribute financially to local candidates are, of course, people the candidates know personally.[25] (See, e.g., Tr. at 1533.) The evidence, as previously considered, *supra* Section V.C.1 at 28 & n. 21, demonstrates that past

[25] For instance, Councilmember Stavrinakis stated that about $49,000 of the approximately $50,000 he raised for his 1998 County Council campaign came from personal contacts. (Tr. at 1491.)

discrimination continues to result in great disparity between the wealth inherent in the African American community and that of the white community. *De facto* separation of the races, therefore, exacerbates the socio-economic legacy of past discrimination by denying an African American candidate full access to the resources of the entire electorate and, further, by forcing her to instead rely on the stunted socio-economic development of her own community.

Anecdotally, African-American County Council candidate Rosemarie West, who ran in 2000, testified that she was not invited to speak to groups at Kiawah and Seabrook Islands, while white Democratic County Council candidate Edie Carson was invited. (Tr. at 1310, 1340, 1343.) In contrast, Councilmember Stavrinakis testified that he was invited to speak to numerous majority-white, as well as majority-African-American, social and civic groups during his 1998 campaign. (Tr. at 1495-1505.) Cindy Floyd, too, was invited to speak at candidates forums on the Isle of Palms and Sullivans Island at which her fellow African-American Democratic running mates were not present. (Tr. at 244-245.) Floyd testified that she "wouldn't imagine" that Freeman and McCoy would have known of these important campaign opportunities. (Id.)

**16 Notwithstanding great improvements, it is clear that Charleston County remains to a large extent separated along racial lines and that this separation not only hinders the ability of African-American candidates to solicit the votes of white voters, but it further helps to explain the extent to which race infuses and informs the racially polarized voting patterns in Charleston County.

On the basis of this evidence, the Plaintiffs have demonstrated that African-American citizens in Charleston

County suffer from a depressed socio-economic status in comparison with white citizens, and that this status is a direct legacy of Charleston County's history of official discrimination. Moreover, the United States has demonstrated that this depressed socio-economic status makes it more difficult presently for Charleston County's African-American citizens to participate in the political process and elect candidates of choice.

D. *Other Voting Procedures That Enhance the Opportunity for Voting Discrimination*

The third Senate Factor considers the "extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group." Senate Report at 29. The evidence shows that this factor weighs ***293** heavily in favor of Plaintiffs. In particular, the Court finds that the sheer size of Charleston County greatly exacerbates the effects of the socio-economic disparities between the races and makes this factor unconventionally significant.

1. Unusually Large Election District

Charleston County is the largest and second most populated county in South Carolina. (U.S.Exs.76-77, 106.) Charleston County includes a stretch along the Atlantic Ocean of nearly 100 miles and contains several major waterways. (U.S.Ex. 76.) As stated, Charleston County is one of only three South Carolina counties that elects its entire county council at-large. (U.S. Am. Comp. ¶ 11; Am. Answer ¶ 6.) The other two counties, Hampton and Jasper, are rural counties with total populations of less than 22,000 residents in each county

and comprised of a close balance of African-American and white citizens. (U.S.Exs.78, 106.) Conversely, Charleston County has a total population that exceeds 300,000 and African Americans only comprise 34.3% (U.S.Ex. 107.)

Several witnesses testified that these geographic and demographic features are an impediment to African-American candidates, who typically have fewer resources, and particularly because costly television advertising and direct mail are deemed important in local campaigns for County Council. (Tr. at 302- 03, 784-786; see also 213, 660, 1426, 1488-89, 1490, 1932-34; U.S. Ex. 14 at 51); *see* *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 494 (2d Cir.1999) ("Campaign financing is especially difficult in such a large district for black candidates, who have been able to campaign more effectively in smaller districts in Nassau County.").

**17 Financial resources directly impact a candidate's ability to win elections. (Tr. at 895.) Several witnesses testified to the financial difficulties African-American candidates generally face in running election campaigns because they have less access to campaign resources than do white candidates. (Tr. at 659-60, 1598-99.) For example, in the 1998 campaign for County Council, African-American Democrat George Freeman raised $1,761. (U.S.Ex. 65E.) For that same election, African-American Democrat Pearl McCoy raised $2,133.91. (U.S. Ex. 65H.) In comparison, white Democrat Cindy Floyd raised and spent $25,961.79 in 1998 during her successful County Council campaign. (U.S. Ex. 65D; Tr. at 225.) As stated, white Democrat Leon Stavrinakis spent $49,627.65 during his successful 1998 County Council race, all but $1,000 of which he raised from other people. (Tr. at 1491; U.S. Ex. 65J.)

John Tecklenburg has been active in the Charleston County Democratic Party since 1986. (Tr. at 778-79.) He worked with African-American candidates who ran countywide, particularly Virginia Morgan for County Council and Charles Green for Coroner in the 1992 election, as well as with white candidates. (Tr. at 786-90, 811-12.) In making fund-raising calls for Green and Morgan, Tecklenburg found that usually reliable campaign donors gave no money to Green or Morgan, or gave them less money than they gave to white candidates. (Tr. at 788-89, 811-12.) Likewise, Bernard Fielding testified that it was more difficult to raise campaign funds for African-American candidates than for white candidates in Charleston County, primarily because the white community has many more financial resources than does the African-American community.[26] (Tr. at 128.)

***294** Additionally, Charleston County Democratic Chairperson, Diane Aghapour, testified that African-American Democratic candidates need to raise "a lot more money" than their white counterparts to "overcome a certain natural discomfort" that some white voters have with African-American candidates. (Tr. at 895.)

The combined effect of socio-economic disparities resulting from past-discrimination; contemporary bias in fund-raising; and the uncommonly large dimension and population of Charleston County works a significant impediment to African Americans' ability to gain equal access to the electoral process in Charleston County.

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[26] Judge Fielding is the one African-American candidate who had substantial campaign funds for a countywide race. In his 1994 race for probate judge, he spent approximately $70,000, half of which came from his own funds. (Tr. at 106.) He was nevertheless defeated. Judge Fielding testified that he believes that "the primary reason I was defeated [in the 1994 probate judge's race] was because I was black." (Tr. at 152.)

2. *De facto* majority vote requirement

Additionally, the United States' expert, Dr. Arrington, and the Private Plaintiffs' expert, Dr. John Ruoff, (Tr. at 410),[27] agree that staggering of terms, residency districts, and a primary nominating system serve as a *de facto* majority vote requirement[28] and limit the opportunities for single-shot voting. The staggering of terms and the residency requirements ensure that all contests are either single-seat or two-seat contests. Because the only viable candidates have been Democrats and Republicans, there are no more than two viable candidates for a single-seat or four viable candidates for two seats. (Tr. at 303.) Minority voters cannot single-shot vote in one seat elections. In addition, single-shot voting[29] does not make sense strategically for African-American voters in two-seat contests for Charleston County Council. (Tr. at 303-06, 2021, 2180-81; Ex.14 at 49-50.) Accordingly, a *de facto* majority vote requirement makes it more difficult for the African-American community

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[27] Dr. Weber necessarily conceded as much, (Tr. at 2022-23), but discounted its materiality and testified that he had never before heard an expert testify to such an "in-effect" majority-vote requirement, (Tr. at 2024).

[28] A majority vote requirement would require a prevailing candidate to receive not simply a plurality of the votes cast in an election but a mathematical majority. (Tr. at 2022 (testifying that under a majority vote requirement, "a candidate to win the nomination of either political party must get--either in the first primary or in the second runoff primary, must get 50% plus 1 of the vote").) Although no such majority vote requirement exists in Charleston County, (id.), when only a single county council seat is at issue in a two-party system (Democrats and Republicans) the winner will almost certainly garner a majority of the votes. (Tr. at 303.)

[29] For a definition of single-shot voting, see *supra* footnote 18.

to employ a traditional strategy of bullet voting in order to improve their chances of electing candidates of their choosing.

E. ***Senate Factor 6: Racial Appeals in the Political Process***

****18** The Court is not greatly impressed with the force of evidence put forward on the sixth Senate factor: the extent to which subtle or overt racial appeals have characterized the political process in the jurisdiction. Not that the United States did not make its case diligently, but by its very nature, the evidence on point, like the evidence of voter intimidation and harassment, tends to be anecdotal and probative more of isolated occasions rather than patterned behavior. Certainly, the Government succeeded in proving individual incidents of subtle or overt racial appeals by a ***295** preponderance of the evidence, but the Court ultimately finds their aggregate force to be of moderate value.

Most notably, the Court finds that some white candidates in Charleston County have traditionally used pictures of their African-American opponents on their campaign literature to alert white voters to the race of the African-American candidate. (Tr. at 98, 949-51.) For instance, in 1973, Sidi Limehouse used a photograph of his African-American opponent, McKinley Washington, in his campaign literature in a race for an at-large State House seat from Charleston County. Limehouse won that election. (Tr. at 712-14.)[30]

In the 1988 Democratic Primary for House District 110, a white candidate distributed campaign literature that

[30] It should be noted that McKinley Washington was later elected to the South Carolina House and Senate and enjoyed lengthy tenures.

displayed a darkened picture of Robert Ford, his African-American opponent. The white candidate prevailed in that primary election.[31] (Tr. at 565-66, 1109-10, 1602; U.S. Ex. 16 at 22 n. 40.)

More recently, in the 1990 general election for Charleston County Probate Judge, a white candidate ran political advertisements in the *Post and Courier* that contained his photograph beside a darkened photograph of his African-American opponent, Bernard Fielding. The white candidate also distributed campaign postcards in the white community with Fielding's picture on them. (Tr. at 97-98, 954-55, 2921.)

In 1992, a white Republican State House candidate distributed campaign literature that included a darkened photograph of his African-American opponent, incumbent State Representative Lucille Whipper. (U.S. Ex. 16 at 22; Tr. at 955-56, 2922-23.) That same year, a white County Coroner candidate distributed campaign literature containing a photograph of her African-American opponent, Deputy Coroner Charles Green. (U.S. Ex. 16 at 22; Tr. at 956-57.)

In a 2000 State Legislative race between two white candidates, one campaign distributed literature with a darkened photograph of African-American Charleston County School Board member Elizabeth Alston. (Tr. at 563-65, 898- 99.) Alston, however, had never been a resident of the House district in which that candidate ran in 2002, and

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[31] During this 1988 primary race, literature was distributed containing a caricature of Ford. This campaign literature contains wording that indicates that it was produced by the Bailey campaign, but the testimonial evidence is silent as to which campaign actually distributed this document. (Defs.' Ex. 30.) Even if this literature was distributed by the Ford campaign, it further illustrates the salience of race in the political process.

no white school board members' photographs were used in this State legislative campaign. (Tr. at 577, 626.) Moreover, Alston did not give permission to the candidate to use her photograph in his campaign literature. (Tr. at 563-65, 898-99.)

Dr. Moore testified that he could not recall a single instance where a white candidate in Charleston County used the photo of his or her white opponent in campaign literature. (Tr. at 2924.)

**19 Moreover, to help overcome white voter resistance to African-American candidacies, there is evidence that African-American candidates have de-emphasized their race in Charleston County campaigns. For example, in 1980, Louis Waring used his photograph in campaign literature during his unsuccessful race for the St. Andrew's Public Service Commission. In his successful 1990 race for the same position, *296 however, Waring decided that the use of his picture on his campaign literature "was not conducive to [his] candidacy." (Tr. at 1369; see also Tr. at 1289, 1367, 1399.) He testified that his photograph in the 1980 campaign had been a hindrance because, without it, some white voters would have believed he was a white person. (Tr. at 1369-71.) Likewise, Waring omitted his membership in the NAACP from his 1990 campaign literature, after having listed that membership in his 1980 literature. (Tr. at 1371.)

White County Council candidates have felt free to use their photographs in their campaign literature. (See, e.g., Tr. at 221, 1493-94.)

William Runyon, who has been involved in the Charleston County Democratic Party for over twenty years as a candidate, party official, and adviser, testified that he has

advised African-American candidates to de-emphasize their race when running for office. (Tr. at 1599-1600.) For example, he advised African-American candidates not to list membership in organizations like the NAACP in their campaign literature. (Tr. at 1600.) Additionally, McKinley Washington, who represented majority-African-American districts in the South Carolina House and Senate from 1974-2000, testified that he always advises African-American candidates that "they had a better shot" by not using their own photographs in campaign literature. (Tr. at 727-28.)

Similarly, Charleston County School Board member Elizabeth Alston stated that she did not use her photograph on her campaign signs during her 1992 County Council race because a number of her African-American supporters advised her that the use of her photograph would not benefit her campaign. (Tr. at 548- 49.) Current Democratic Party Chairperson Diane Aghapour testified that she advises African-American candidates not to use their photographs in direct mail advertising. (Tr. at 895.) Indeed, Aghapour gave that advice most recently to Pearl Ascue, an African-American Democratic candidate for County Council running in 2002. (Tr. at 895-96.)

A bizarre 1990 episode reflects the continuing role of racial appeals in Charleston County's political system. That year a Charleston-based political consultant ran the campaign of his sister, a candidate for Lt. Governor. Concerned that conservative low-country voters might stay home, the consultant bankrolled Benjamin Hunt, Jr., a nearly illiterate African-American man, to run in the primary against the incumbent United States Representative Arthur Ravenel. The political consultant believed that this would bring out more anti-black voters in the low-country area and help his sister in the primary against her major opponent whose

strength lay in the middle and upper part of the state. He paid Hunt's filing fee and gave him $500. Hunt, who had never voted, took no part in the campaign beyond allowing his picture to be taken. The consultant mailed out thousands of "Hunt for Congress" leaflets showing a photograph of Hunt with a Kentucky Fried Chicken sign in the background. The *News and Courier* reported that the consultant had his clients publish pictures of black challengers, but he never had them publish pictures of white challengers. (U.S. Ex. 16 at 21-22; Tr. at 953-54; see also Tr. at 2545.)

****20** Jimmy Stuckey, who has been active in the Charleston Democratic Party for approximately 30 years, testified that some whites believed that the Democratic Party is "controlled" by African Americans. (Tr. at 2549.) William Runyon, who has been active in the Charleston County Democratic Party for more than 20 years, testified that, in recent years, he has heard the ***297** Democratic Party referred to as the party of the African-Americans. (Tr. at 1601.)

Clearly, racial appeals have been and continue to be a part of the political dialogue in Charleston County, to some degree; and while these testimonial accounts and incidents are not exhaustive, neither are they pervasive. Accordingly, they cannot be determinative of that degree.

VI. Additional Factors[32]

As stated, the Senate has also recognized the following "[a]dditional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation":

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[32] The United States has not asserted that the fourth Senate Factor, denied access to a candidate slating, is an element of their case.

• whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and]
• whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29 (footnotes omitted).

Although the Court received evidence on both factors, the United States has not put them at issue. Specifically, The United States' Amended Complaint did not allege that the policy underlying the at-large method of election is tenuous and further moved to limit the Defendants from putting forward evidence of responsiveness. The Court has considered all of the evidence related to the factors of tenuousness and responsiveness and finds that they do not materially contribute to the Court's conclusion.

VII. Charleston County's Partisanship Defense

Throughout, Defendants have rather singularly insisted upon hanging the proverbial "hat" of their defense on the contention that the "cause" of voting polarization in Charleston County is partisan differences rather than racial ones.[33] Specifically, Defendants contend that Section 2's "on account of race or color"[34] language necessarily requires

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[33] On the basis of both *Gingles* and the Fourth Circuit's decision in *Lewis v. Alamance County*, 99 F.3d 600, 615 (4th Cir.1996), the Court has already rejected Defendants' argument at summary judgment that issues of "causation" had any place in the Court's consideration of the three *Gingles* preconditions.

[34] Section 2 is divided into two subsections, 2(a) and 2(b). 42 U.S.C. § 1973. Subsection 2(a) forbids any voting practice "which *results* in a denial or abridgement of the right of any citizen of the United States to vote *on account of race or color,* or in contravention of the guarantees in

Plaintiffs to show that race explains the pattern of defeat of minority-preferred candidates.

As stated, the Supreme Court interpreted Section 2 to provide a minority group ***298** with an equal opportunity to the electoral process. The central and dispositive question is "whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Gingles*, 478 U.S. at 63, 106 S.Ct. 2752. The Fourth Circuit, in *Lewis v. Alamance County*, 99 F.3d 600, 615 (4th Cir.1996), has concluded that causation may be one of many issues relevant to the totality of circumstances although irrelevant to the analysis of the *Gingles* preconditions. *Id.* at 615 n. 12. Importantly, however, *Lewis* does not require plaintiffs to prove that race has caused the inequality of result. Nor did it hold that proof of factors other than race, like partisanship, constitute a complete defense. *See id.*

****21** In *Goosby v. Town Bd. of Town of Hempstead, N.Y.*,

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section 4(f)(2), *as provided in subsection (b)*". 42 U.S.C. § 1973(a) (emphasis added). Plaintiffs, therefore, contend that what constitutes voting discrimination "on account of race or color" is defined in subsection 2(b). *Id.* Specifically, Plaintiffs argue that Subsection 2(b) makes it clear that a violation exists when it is shown that a racial group lacks equal opportunities and equal results which constitute a violation, regardless of the reasons why such inequality exists: "A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the [jurisdiction] are not equally open to participation by members of a class [protected by subsection 2(a)] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

180 F.3d 476 (2d Cir.1999), the Second Circuit expressly recognized the Fourth Circuit's approach in *Lewis* and held that partisanship is not a defense to a Section 2 claim. In *Goosby*--as in this present case--"the principal and pervasive argument of the Town [was] that political partisanship, rather than race, account[ed] for the defeat of black candidates." *Goosby*, 180 F.3d at 495. Republican candidates had always won Town Board elections and African-American voters usually supported losing candidates. *Id.* at 484, 489, 492. The Town Board included an African-American Republican. *Id.* at 486. Expressly adopting the Fourth Circuit standard in *Alamance County*, the Second Circuit stated that the partisanship issue was relevant to the totality of circumstance analysis but not relevant to the *Gingles* preconditions. *Id.* at 492-93.

The Second Circuit, moreover, firmly rejected the partisanship defense. Indeed, the court stated that the defendants' partisanship defense

> represent[ed] a fundamental misunderstanding of what the plaintiff class alleged and proved to the satisfaction of the district court. The claim was that the at-large system of voting made it impossible for blacks to elect their *preferred candidates*. The Town's argument implies that if blacks registered and voted as Republicans, they would be able to elect the candidates they prefer. But they are not able to elect preferred candidates under the Republican Party regime that rules in the Town. Moreover, blacks should not be constrained to vote for Republicans who are not their preferred candidates.

Id. at 495-96 (emphasis in original).

Defendants rely on the conclusion of other circuits that proof of race-neutral causes of observed voting patterns can defeat a claim of minority vote dilution. In *League of United*

Latin American Citizens, Council No. 4434 (LULAC) v. Clements, 999 F.2d 831 (5th Cir.1993) (en banc), *Nipper v. Smith*, 39 F.3d 1494 (11th Cir.1994) (en banc), and *Uno v. City of Holyoke*, 72 F.3d 973 (1st Cir.1995), the circuit courts of appeal recognized the relevance of proof that the majority's voting behavior could best be explained by such race-neutral reasons as political partisanship or party affiliation, unrelated to the minority-preferred status of the defeated candidate. *See, e.g., LULAC*, 999 F.2d at 850-51. Specifically, the courts recognized that a vote dilution claim could be defeated by proof that these race-neutral reasons in fact provided the best explanation for electoral outcomes.

In *LULAC*, for example, the district court excluded evidence tending to show divergent voting patterns were attributable to race-neutral factors, finding that such evidence was irrelevant and legally ***299** incompetent. Reversing, the Fifth Circuit emphasized that Section 2's "rigorous protection" extended only to "defeats experienced by voters 'on account of race or color.' "[35] *LULAC*, 999 F.2d at 850. In rejecting the district court's construction and interpretation of the relevance of the circumstances surrounding electoral

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[35] To the extent *LULAC*, *Nipper*, or *Uno* might suggest that "on account of race or color" narrowly concerns the cause of divergence in majority and minority voting preferences and requires some proof that the white majority *votes* differently because of racial animus, the Court disagrees. As the Senate factors plainly suggest, "on account of race or color" is a more far-reaching requirement that the Court consider the totality of pressure points which racial discrimination and disadvantage might aggravate, including, for example, the present effect of past discrimination on socio-economic status and, therefore, on political participation. Depressed socio-economic status from past discrimination which results in severely diminished political participation could constitute a "denial or abridgement of the right to vote ... on account of race or color," without regard to any present racial animus of the white electorate in their voting preferences.

results, the Fifth Circuit emphasized:

> **22 Without an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense "discriminatory," and any dissension between deprivation and their losses at the polls becomes untenable in holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the District Court unloosed Section 2 from its racial tether and fused illegal vote dilution and political defeat.
> *Id.*

At bottom, there is little difference between the Fifth Circuit's decision in *LULAC* and the Fourth Circuit's decision in *Alamance County* for purposes of this case. In fact, the Fourth Circuit explicitly agreed with the Fifth Circuit to the extent its decision in *LULAC* found "cause" to be relevant to the ultimate inquiry. *Alamance County*, 99 F.3d at 615. *Alamance County* simply teaches that the Court should consider evidence of causation within the totality of its inquiry. As stated, however, *Alamance County* implies no requirement that Plaintiffs prove that the inequality of result is caused by race and, conversely, suggests no guarantee that proof of race-neutral factors will operate as a complete defense.

Therefore, in keeping with the Fourth Circuit's instruction the Court allowed both parties opportunity at trial to develop a full record concerning causation and received significant expert testimony to that end. The Court will consider such evidence and fold any findings into its totality of the circumstances inquiry.

Initially, the Court finds the issue of voting-causation to be desperately illusive. As a theoretical matter, the Court is inclined to reject the possibility that any methodology might be able to adequately identify a singular or even dominant cause of a community's corporate voting behavior, which is in fact the aggregation of an innumerable series of individualized choices and pluralistic discretions made by thousands of people generally out of any meaningful political association with one another. Certainly where there is a consistent pattern of cohesive voting among a community of voters, as is here, the decisional nuances over the particularized issues of any single individual's vote begin to fall away, and more global factors such as race and socio-economic status begin to emerge as likely explanations for the pervasive commonality in voting behavior among communities of race. Nonetheless, ***300** the Court is dissatisfied with the speculation of associating cause with the voting polarization evidenced by the Record in this case. The task of separating out the individual influence of race and party is a weighty one.

Consistent with these concerns, Dr. Arrington, expert for the United States, testified that the multi-colinearity[36] of these more global causes of race and partisan affiliation in Charleston County elections renders the individual force exerted by any one cause nearly inextricable from the influence of the other. (Tr. at 310.) Dr. Arrington testified, further, that even if the experts had attempted to conduct a multivariate analysis[37] that "you could not pull out

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[36] In statistical analysis, multi-colinearity is a correlation between two independent variables that is so strong that it is impossible "statistically to separate them out and tell which of those two effects the dependent variable; which of those two is the cause." (Tr. at 310.)

[37] A multivariate analysis attempts to measure the effect of two or more independent variables on the dependent variable as opposed to a more

statistically the difference between partisanship and race." (Tr. at 310.) Dr. Weber, expert for Defendants, further acknowledged that he could not, with a reasonable degree of social science certainty, determine the extent to which racial attitudes caused polarized voting in Charleston County, and that he believed factors of race and partisanship are "inextricably intertwined" in such a way that they could not be separated statistically, to wit, they are multi-colinear. (Tr. at 238-39, 2220-21.)

**23 Moreover, it is clear from the Record that to the extent other methodologies or models might begin to partly unbraid the intertwined influence of race and partisan affiliation, these methodologies could not have been employed in this case or have not been employed to a satisfactory degree.

Both Dr. Arrington, (Tr. at 309-310), and Dr. Weber, (Tr. at 1992-93), agree that party registration data and survey research are the primary sources of data relied on by political scientists in drawing conclusions concerning the effect of political partisanship on election results. It is also agreed that neither type of data is available concerning Charleston County elections because there is no requirement that voters register by party for general elections and no relevant survey research has been conducted. (See, e.g., Tr. at 309.)

Dr. Weber identified consideration of "behavioral partisanship" as a third methodology for measuring the effect of partisanship on election results. (Tr. at 1980, 1992-93.) This methodology looks at the "past behavior of voters." (Tr. at 1993.) In his behavioral analysis at trial, Dr. Weber first focused on party-switching and the effect it had on the

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traditional analysis, which would control for only a single independent variable.

African-American support for candidates, Dr. Charles Wallace, for County Council and Keith Summey, for the Mayorship of North Charleston. Dr. Weber observed that Dr. Wallace was significantly supported by the African-American community as a Democrat, but received "virtually no support from the nonwhite community" after his affiliation with the Republican party. (Tr. at 1997.) Dr. Weber also identified Mayor Summey as another candidate who received significant African American support "as a Democrat happened to lose but, again, then comes back and runs as a Republican and wins." (Tr. at 1997.)

***301** Dr. Weber further testified that the election of Timothy Scott, an African American candidate, to County Council demonstrates that partisanship not race is the cause of polarization and patterned-defeat. Dr. Weber stated that "if you think that the voters are cued on race--race is the reason why they are going to not vote for a candidate--you would expect that the voters, assuming that they are aware that Scott is an African-American candidate, that the white voters would not vote for him." (Tr. at 1998.)

Finally, Dr. Weber discussed the success of African-American candidates in County School Board races as further evidence that party and not race was the primary cause of polarization and patterned-defeat. Specifically, Dr. Weber testified that the School Board races

> are different in character than the elections for Countywide State or national office, because these are elections that are conducted without partisan designation. So the voter does not know unless the voter is very well informed or has been contacted by parties, for example, to say, this is the Democrat or, this is the Republican, or anything like that. So a lot of voters are lacking in the partisan information. And I did this to control for the possibility that there would

be racial polarization in such nonpartisan elections which would be confirmatory or perhaps denied the findings in the partisan general elections.

****24** (Tr. at 2001-02.) Dr. Weber concluded that without the "partisan cue" polarization was less severe, suggesting again that party and not race was the better explanation for the patterned defeat of minority-preferred candidates.

The Court is unpersuaded by the behavioral analysis of Dr. Weber. First, the analysis is insufficiently comprehensive. While Dr. Weber did not fully explain his behavioral methodology, which is admittedly recognized by only a segment of the social science literature, (Tr. at 1993), the Court suspects that it requires a more exacting inquiry than has been conducted here, including in the least a measurement of precinct voting patterns and candidate platforms over a course of elections. In fact, Dr. Weber stated that in determining whether partisanship is a better explanation for polarized voting patterns than race in Charleston County, he would want to consider the nature of the campaigns, the issues raised in those campaigns, newspaper endorsement of candidates, mobilization efforts during those elections, and field survey research, including voter interviews. (Tr. at 2054-65, 2082, 2093, 2168, 2170-71; see also 2994-96.) No such efforts have been made. The Court simply cannot conclude on the strength of isolated instances that party affiliation better explains the patterned-defeat in Charleston County. Moreover, as the ultimate factfinder, the Court views the behavioral analysis conducted by Dr. Weber as inherently more speculative and subjective than the other methodologies identified by the experts for proving cause and therefore assigns it less weight. *Cf., e.g.,* *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir.1999); *Benedi v. McNeil-P.P.C., Inc.* 66 F.3d 1378, 1385 (4th Cir.1995). For the same reason, the Court is

certain that even a more involved behavioral analysis would not have compelled a different conclusion.[38]

Further, the Court disagrees that Dr. Weber's conclusions properly follow from his observations. As discussed, *supra* Section V.B at 19, the success of African-***302** American candidates in the School Board races has already been adequately explained by special circumstances unique to those elections. As for the effects of party-switching, the Court is not sure that this evidence is even probative of the causation issue at all. Evidence of dramatically depressed African American support for Dr. Wallace after his re-affiliation with the Republican party moves the Court no closer to understanding why whites consistently identify with the Republican party and why African Americans so consistently identify with the Democrat party, or why such consistent correlation results in a patterned defeat of African-American preferred candidates in Charleston County. It certainly does not explain, in any respect, why African Americans abandoned their support for Dr. Wallace. Notwithstanding whatever ideological position Dr. Wallace may have held after his re-affiliation, the reasonable African American voter might have formed any number of conclusions concerning the meaning and effect of his party-switch. Dr. Wallace's loss of support only tends to reinforce that which the Court already knows--cohesion in Charleston County is stalwart. As stated, whether such unbending correlation between race and party is driven by race or ideology or, as the Court suspects, some cross-pollenization of both is frustratingly beyond the capacity of the Court and the evidence before it, and it remains a mystery that Dr.

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[38] It should be noted that much of Dr. Weber's research concerning behavioral partisanship was submitted in an untimely declaration properly rejected by the Magistrate Judge.

Wallace's election or Mayor Summey's[39] election do little to illuminate.

**25 Finally, Timothy Scott's election to County Council certainly demonstrates that his race was not a fatal impediment to either significant white support or his ultimate success. Alone, however, his election can do little to proving the ultimate cause of legally-significant, preferred-candidate defeat in Charleston County. As demonstrated, his elections have been the exception in Charleston County, and the Supreme Court has made it clear that the decisive evidence regarding voting patterns is what *usually* occurs in a jurisdiction, and not aberrational election results produced by special circumstances. *See* Gingles, 478 U.S. at 57 n. 26, 106 S.Ct. 2752. Indeed, Dr. Weber stated that political scientists study voting by looking at "overall patterns." (Tr. at 2225-26, 2091.) Here, Scott not only received white support not received by other African-American candidates--regardless of party--but he received unprecedented financial support ($5,000) in a local election from the South Carolina Republican Party and other sources. (Tr. at 2311, 2317-18.) No other current Republican County Councilmember received *any* direct financial support from the State Republican Party. (See U.S. Exs. 65A-C, F-G, and K, financial disclosure statements for current Republican Charleston County Councilmembers other than Scott). In fact, Dr. Wallace acknowledged that such support was not merely unusual but unheard of. (Tr. at 1791.) With the help of Buck Limehouse, the State Republican party, and others, Scott raised an unprecedented $20,000 to $25,000 for the 1995 special election, a sum Scott described as "substantial." (Tr. at 2311.)

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[39] The Court cannot identify any evidence that Mayor Summey lost the support of African Americans upon his re-affiliation with the Republican party.

Notably, each of his elections were still characterized by racial polarization and the ultimate defeat of the African-American preferred candidate.

Accordingly, Dr. Weber's behavioral analysis, to the satisfaction of the Court, does not demonstrate that anything other than race explains the voting polarization ***303** in Charleston County.[40]

Although he admittedly did not conduct a traditional analysis of causation, the United States' expert, Dr. Arrington, offered an opinion as to whether race had caused the pattern of polarized voting between white and African-American voters. Dr. Arrington opined that race, and not partisan affiliation, was the main reason why white and African-American voters voted differently.

As a preliminary matter, Dr. Arrington noted that the statistical methods of bivariate ecological regression analysis and extreme case analysis used by all the statistical experts in this case indicate *how* people voted but not *why* people voted for particular candidates. (Tr. at 308 ("But about why they vote the way they do when they get there, that's a new field for me.").) As stated, Dr. Arrington found that partisanship and race are closely intertwined in Charleston

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[40] Defendants also contend that pervasive use by African Americans of the Master Lever on the Shouptronic voting machines contributes to the polarization of voting and proves that party and not race is the cause of such polarization. First, there is no evidence of the extent to which the Master Lever is exercised by the African-American community. Second, even if African Americans consistently use the Master Lever, it still cannot be understood whether this strong affiliation with the Democratic party, manifested through exercise of the Master Lever, is for racial or non-racial reasons.

County, and both are highly correlated to how voters vote. (Tr. at 310-311.) Thus, it is undisputed that race, partisanship, and vote are highly correlated.

****26** Dr. Arrington, however, introduced the following theoretical model to demonstrate that race must be the primary cause of voter choices. (See U.S. Ex. 111; Tr. at 311-14.) The model considered three variables and how they each exercised force in relation to one another: race, party affiliation, and the ultimate vote. A person's vote *cannot* cause or influence a person's race or partisan affiliation. On the other hand, a person's race or partisan affiliation *can* influence how that person votes. In regard to race and partisanship, a person's race can be the cause of their partisan affiliation; but the converse cannot be true because race is an immutable characteristic. Dr. Arrington concluded, therefore, that race must be the key causal variable because it can cause vote directly and it can also cause vote through the mediating variable of partisanship. *Id.*

However, Dr. Arrington's model is also unsatisfactory. Although the relational axioms are true, the conclusion is a non-sequitur. Certainly race is the only variable of the three which can inform both of the remaining variables, but the model cannot demonstrate that race exerts the *greatest* influence. In other words, the combined force that race exerts over a person's vote--the force exercised over the ultimate vote *directly* plus the force as *mediated* through party--still may be less than the total force that party alone (ideology) exerts over the ultimate vote. For example, (assigning generic units of measure to the force exercised) race might exercise a force of 10 units *directly* and another 10 units out of a 100 mediated through party, but the party variable alone would still exercise 90 units of force independently. The model can only explain *how many*

avenues of influence race enjoys and *not how great* or strong that aggregate influence is.

In sum, the experts have not conducted an analysis of causation, in great part, because the necessary data is not available. To the extent methodologies and models have been used to assist the Court in coming to a conclusion, they have produced somewhat unsatisfactory results. ***304** As stated, however, the problem lies inherently in the morass of the causal inquiry itself, and not in the thoughtful consideration of the experts' observations. The Court finds that the influence of race and party on voting patterns in Charleston County, on the facts of this case, are too closely related to isolate and measure for effect. The Court, therefore, concludes that the evidence fails to demonstrate that race-neutral factors explain the voting polarization in Charleston County.

Therefore, remaining mindful that Plaintiffs need not prove any particular number of Senate factors or that a majority of them point "one way or the other," *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752, the Court concludes that evidence under Senate factors seven, two, and three of severe voting polarization, minimal minority electoral success, and an uncommonly large voting district decisively points towards a violation of Section 2. The combined strength of the evidence under Senate factors one and five of depressed political participation as a result of pervasive past discrimination in education and employment and past discrimination touching the right to vote also weighs in favor of a finding that the at-large system violates Section 2. Evidence of racial appeals has not materially assisted the Court in reaching a conclusion. Finally, there is no evidence that anything other than race explains the severe voting polarization observed in Charleston County Council

elections.

**27 The Court therefore concludes, viewing the totality of the circumstances, that the at-large system of election for the Charleston County Council unlawfully denies African Americans equal access to the electoral process in contravention of Section 2 of the Voting Rights Act. African Americans in Charleston County, on account of their race, have inherited a depressed socioeconomic posture which hinders political participation and exacerbates the effect of already severely polarized voting.

VIII. Constitutional Claim of Private Plaintiffs

Notwithstanding the Court's determination that the at-large electoral system results in unequal access to the electoral process for African Americans, it cannot conclude on the evidence before it that such system was adopted with the intent to discriminate. The Court, therefore, rejects the claim of the private Plaintiffs that the adoption of the at-large system for electing members of the Charleston County Council was motivated by a racially discriminatory purpose in violation of the intent standard of Section 2 and the 14th Amendment of the United States Constitution.

The United States Supreme Court has emphasized that racially discriminatory motivation is a necessary ingredient of a 14th and 15th Amendment violation.[41] *Village of*

[41] As stated, claims of intentional discrimination under Section 2 are assessed according to the standards applied to constitutional claims of intentional racial discrimination in voting. *See* *Garza v. County of Los Angeles*, 918 F.2d 763, 766 (9th Cir.1990) ("[T]he Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes.")

Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 117 S.Ct. 1491, 1502-03, 137 L.Ed.2d 730 (1997) (noting applicability of *Arlington Heights* analysis in vote dilution cases); ***305***City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (controlling principles for assessing 14th and 15th Amendment claims); *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); *see also Irby v. Virginia State Board of Elections*, 889 F.2d 1352, 1355 (4th Cir.1989) ("To establish an equal protection violation, a plaintiff must show discriminatory intent as well as disparate effect."); *Washington v. Finlay*, 664 F.2d 913, 919 (4th Cir.1981), *cert. denied*, 457 U.S. 1120, 102 S.Ct. 2933, 73 L.Ed.2d 1333 (1982). In order to establish a violation of the Equal Protection Clause of the 14th Amendment, the burden is upon the private Plaintiffs to show discriminatory purpose and effect.

"Discriminatory purpose" implies more than "intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of' ... its adverse effects upon an identifiable group." *McCleskey v. Kemp*, 481 U.S. 279, 298, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Under *Arlington Heights*,[42] discriminatory purpose may be established by proof that Charleston County used race as a motivating factor in establishing and maintaining the present at-large electoral system. *Arlington Heights*, 429 U.S. at 265-66, 97 S.Ct. 555.

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[42] The Senate report expressly incorporates the considerations in *Arlington Heights* for purposes of analyzing a Section 2 intent standard claim. S.Rep. No. 417 at 27 n. 108.

In determining the ultimate issue in an *Arlington Heights* analysis of whether there is sufficient evidence to suggest invidious discriminatory purpose as a motivating factor, the Court is called upon to make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," *id.* at 265, 97 S.Ct. 555, and should consider the following factors in assessing whether such a purpose or discriminatory intent was in fact a motivating factor in a jurisdiction's enactment of legislation:

****28** (1) Whether impact of the official action bears more heavily on one race than another;

(2) The historical background of the jurisdiction's decision;

(3) The specific sequence of events leading up to the challenged decision;

(4) Departures from the normal procedural sequence; and

(5) The legislative and administrative history, especially any contemporary statements by members of the decision-making body.

Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 265, 97 S.Ct. 555; *Washington v. Davis*, 426 U.S. at 241-42, 96 S.Ct. 2040.

The private Plaintiffs rely largely on temporal evidence to prove that the at-large electoral system was adopted for invidious and discriminatory purposes. Specifically the private Plaintiffs contend that the at-large system was a known device for diluting minority voting strength, increasingly used throughout the South, and conspicuously adopted after the passage of the Voting Rights Act and in response to increased African American registration and political activity. Private Plaintiffs point to other actions taken during the same period to insulate white control of the electorate including the annexations of white populations to maintain Charleston as a majority white city, abolishing elections for the school board in majority African-American

districts only, and racially motivated opposition to school consolidation on the grounds that it would lead to integration.[43]

Certainly "historical background of the decision is one evidentiary source, particularly ***306** if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555. However, Charleston County also put forward competent evidence that the legislation enacted in 1969 to change the method of election was, in fact, accomplished to satisfy the one-person, one-vote mandate of the United States Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) and *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968).[44] Unfortunately, there is neither legislative history nor contemporaneous accounts or statements made by decision makers to further illuminate the inquiry. The change to the at-large system might reasonably be explained in the context of either of the historical explanations advanced by Plaintiffs and Defendants, respectively, and the evidence fails to convince the Court that some invidious discriminatory purpose was, in fact, the

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[43] The Court primarily received evidence of discriminatory intent through the lengthy examination of Dr. Vernon Burton. (Tr. 1127--1253.) While the Court received further credible testimony, which it considered probative of a lack of discriminatory intent, from Lenny Krawcheck, a very credible member of the legislative delegation at the time of the adoption of the at-large system, the Court remains mindful of the Supreme Court's warning in *Arlington Heights*, that testimony of original decision-makers should be cautiously considered only under extraordinary circumstances. For that reason, his testimony bears little on the decision of the Court.

[44] The private Plaintiffs counter that the South Carolina Attorney General advised the County that the Supreme Court's decision in *Avery* did not require at-large voting for the County Council. This evidence alone does not, however, disprove that it was not in fact adopted for such reason.

motivating factor over compliance with the one-man one-vote requirement.

Of the remaining *Arlington Heights* considerations, there is no evidence of a departure in normal procedures. It is clear, however, as evidenced by the totality of the circumstances inquiry, that any ill effects of the at-large system have fallen squarely on the shoulders of the African American community. Although a clear pattern of disparate burden, unexplainable on grounds other than race, can sometimes emerge "from the effect of the state action even when the governing legislation appears neutral on its face," *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915); *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960)), such cases are rare and "[a]bsent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence," *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555. This case is not one of those rare instances.

**29 While the Court may deduce intent from circumstantial evidence, it cannot on the evidence before it conclude that the at-large system was adopted for discriminatory purposes. Certainly the timing of the General Assembly's adoption of the at-large system raises suspicions, but the Court will not disparage its authors without more compelling evidence, particularly in light of other reasonable and historical explanations for the adoption of the at-large system. The private Plaintiffs' constitutional claim and claim based on the intent standard of Section 2 are, therefore, denied.

CONCLUSION

To the satisfaction of the Court and by a preponderance of the evidence, both the ***307** United States and the Private Plaintiffs have demonstrated that the at-large system of elections for the Charleston County Council denies African Americans, on account of their race and color, equal access to the electoral and political process, in contravention of Section 2 of the Voting Rights Act. Accordingly, it is hereby **DECLARED** that Charleston County's at-large method of election is illegal and cannot be enforced in future elections. It is, therefore, **ORDERED**, that any further use of the at-large system of election for the Charleston County Council is hereby **ENJOINED**. The Private Plaintiffs, however, have failed to establish their constitutional claims. Accordingly, such claims for relief as are based upon the intent standard of Section 2 of the Voting Rights Act and the United States Constitution are hereby **DENIED**.

AND IT IS SO ORDERED.

316 F.Supp.2d 268, 2003 WL 23507001 (D.S.C.)

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Only the Westlaw citation is currently available.

United States District Court,
D. South Carolina,
Charleston Division.

THE UNITED STATES of America, Plaintiff,
v.
CHARLESTON COUNTY, South Carolina; **Charleston County** Council; John O. Conlon,
TOI Ahrens Estes, Cindy M. Floyd, Curtis E. Bostic, A.D. Jordan, Barrett S.
Lawrimore, Timothy E. Scott, Leon E. Stavrinakis, Charles Wallace, members of
Charleston County Council; **Charleston County** Election Commission,, Defendants.
Lee H. MOULTRIE, George Freeman, Maggie McGill, and Sandra Flower, Plaintiffs,
v.
CHARLESTON COUNTY COUNCIL, and
CHARLESTON COUNTY ELECTION COMMISSION,
Defendants.

No. 2:01-0155-11, 2:01-562-11.

July 10, 2002.

Background: Plaintiffs filed motion for partial summary judgment on the three *Gingles* preconditions in Voting Rights Act suit challenging at-large system for electing members to county council, and also moved for preliminary injunction.

Holdings: In adopting recommendation of United States

Magistrate Judge Carr, ,the District Court, Duffy J., held that:

(1) three *Gingles* preconditions were established, and

(2) public interest would not be served by preliminarily enjoining upcoming county council election under existing at-large system.

Motion for partial summary judgment granted; motion for a preliminary injunction denied.

Jon Rene Josey, Turner Padget Graham and Laney, Florence, SC, John H. Douglas, U.S. Attorneys Office, Charleston, SC, Joseph D. Rich, Christopher Coates, U.S. Department of Justice, Washington, DC, for Plaintiffs.

A. Arthur Rosenblum, Rosenblum and Goldberg, Charleston, SC, Bernard Eugene Ferrara, Jr., Joseph Dawson, III, **Charleston County** Legal Department, N Charleston, SC, Samuel W. Howell, IV, Howell and Linkous, Mt Pleasant, SC, Benjamin E. Griffith, Cleveland, MS, Lucas C. Padgett, Jr., Michael C. Scarafile, McNair Law Firm, Mikell Ross Scarborough, Charleston, SC, for Defendants.

ORDER

DUFFY, District Judge.

***15** This matter is before the Court upon the Magistrate Judge's recommendation that this Court grant Plaintiffs' motion for partial summary judgment on the three preconditions, as outlined in the United States Supreme Court decision, *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), requisite to a Voting Rights Act

claim pursuant to 42 U.S.C. § 1973. A party may object, in writing, to a magistrate judge's Report and Recommendation ("Report") within ten days after being served with a copy of that report. 28 U.S.C. § 636(b)(1). The Magistrate's Report was filed on April 26, 2002. Defendants filed timely objections on May 6, 2002.

DISCUSSION

I. Magistrate Judge's Report and Recommendation

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the Court. *Mathews v.. Weber*, 423 U.S. 261, 269, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). The Court reviews *de novo* those portions of the Report to which a specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1)(C).

After a review of the entire record and the Report, and a *de novo* review of Defendants' objections, the Court finds that the Magistrate Judge fairly and accurately summarized the facts and applied the correct principles of law. Accordingly, the Magistrate Judge's Report is adopted in whole and incorporated into this Order by specific reference.

The Report sets forth in detail the relevant facts involved in this case, and the Court incorporates those facts as described in the Report without a recitation.

II. Legal Standard For Summary Judgment

To grant a motion for summary judgment, the Court must

find that "there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). The Court is not to weigh the evidence but rather to determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All evidence should be viewed in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir.1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir.1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof." ' *Hughes v. Bedsole*, 48 F.3d 1376, 1381 (4th Cir.1995) (quoting *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir.1990)). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual bases." *Celotex*, 477 U.S. at 327.

III. Section 2 Violation

Plaintiffs have brought this action complaining that the present at- large system for electing members to the **Charleston County** Council was adopted with "an intent to discriminate against black voters and that it results in discrimination in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth Amendment of

the Constitution of the United States." (Pl.s' Mem. Supp. Partial Summ. J. at 1). To prevail upon their claim for a violation of Section 2[1] of the Voting Rights Act, Plaintiffs must first establish the following preconditions, as outlined by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986):

> 1. that the minority group at issue is sufficiently large and geographically compact to constitute a majority in a single-member district;
> 2. that the minority group is politically cohesive; and
> 3. that the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed--usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 50-51. If these preconditions are met, the Court must then determine under the "totality of circumstances" whether there has been a violation of Section 2.

The Magistrate Judge recommended that this Court grant Plaintiffs' motion for partial summary judgment as to each *Gingles* precondition. Because the Court finds the Magistrate Judge's Report thorough and well-reasoned, it is adopted in whole and incorporated into this Order. Defendants make the

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[1] Section 2(a) of the Voting Rights Act of 1965 prohibits a State or its political subdivisions from imposing any voting practice "in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Section 2(b) of the Act, as amended in 1982, further provides that a violation of section 2(a) occurs, if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 42 U.S.C. § 1973(b).

following objections only as to the Magistrate Judge's determination that no genuine issue of fact remains as to the third *Gingles* precondition--"white bloc- voting." The Magistrate Judge's recommendation that Plaintiffs' motion for summary judgment, as to the first two preconditions, is not contested.

IV. Objections

First, Defendants contend that the Magistrate Judge improperly "collapsed the second and third preconditions of minority political cohesion and racial bloc voting into a single requirement that plaintiffs show 'racially polarized voting." ' (Def.s' Obj. at 4). In support, Defendants reference the Magistrate Judge's remark that "[t]he second and third preconditions are generically referred to as a showing of racially polarized voting." (Def.s' Obj. at 4 n.6 (quoting Report at 12)). The Court finds no error in either the Magistrate Judge's characterization or in his ultimate consideration of the second and third preconditions. Consistent with the law as recited by Defendants' in their own objections, the Magistrate Judge unequivocally considered the preconditions independent of each other. The Magistrate Judge quoted the relevant language from *Gingles* detailing the factual showing required to establish both preconditions. The Magistrate Judge then separately considered the portions of Defendants' expert's testimony regarding each precondition, concluding that Dr. Weber "conceded both points [preconditions]," (Report at 13). (See Report at 13-15).

The Magistrate was clear in his separate consideration of the preconditions. At page 13 of the Report, he states, "With regard to whether minority group members constitute a politically cohesive unit ...." (Report at 13). In contrast at

page 15, the Magistrate transitions, "With regard to the block voting by white voters ...." (Report at 15). Excerpts from Dr. Weber's expert deposition testimony and other evidence material to the second and third preconditions followed each respective transition. Specifically, the Magistrate Judge quoted Dr. Weber's concession of the second and third preconditions, (Report at 13-14, 15), and cited "statistics presented by Dr. Weber and Dr. Arrington [which] indicated that majority white voting is sufficient to usually defeat the combined minority voting plus white 'crossover" ' votes in **Charleston County**," (Report at 15-16).

Moreover, it is wholly appropriate to characterize the second and third preconditions as means to a broader and more singular end. The inquiries into each, while discreet in execution, are married in purpose:

> The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat minority's preferred candidates. Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices.
> *Gingles*, 478 U.S. at 56.

Accordingly, the United States Supreme Court itself defines racially polarized voting in terms of both preconditions. The Court, therefore, finds that the Magistrate Judge's characterization was appropriate and, further, that the Magistrate Judge made sufficiently independent findings as to each precondition.

Next, Defendants complain that the Magistrate Judge "imputed to **Charleston County** specific findings on racial

polarization in State House and Senate elections made by a three-judge court in *Colleton County Council v. McConnell,* C.A. No. 01-3581-10 (D.S.C. Mar.20, 2002)." (Def.s' Obj. at 5). Defendants argue that the Magistrate Judge should have made a more specific inquiry into the "characteristics of [the] challenged electoral system, not upon legislative or senate districts, or the level of cohesion or racial polarization in those districts." (Id.). The Magistrate Judge's alleged "reliance" on *Colleton County,* however, was complementary at best. The quoted passage from *Colleton County,* recited in the Report, simply acknowledges the statewide polarization of voting common at most electoral levels. (Report at 22). The Magistrate Judge was not imputing specific findings of polarized racial voting in legislative or senate districts to the electoral patterns of **Charleston County** Council elections, as Defendants would suggest, but rather referencing the general conclusion that racial polarization of voters continues to be characteristic of South Carolina elections:

> Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting.

Colleton County Council, No. 01-3581, Slip op. P. 46-47 (March 20, 2002).

It is apparent from the Report that the findings in *Colleton County* did not form the basis of the Magistrate Judge's determination that the third *Gingles* precondition had been satisfied. Rather, the Magistrate Judge relied heavily on what he interpreted as the Defendants expert's express concession that the third *Gingles* precondition had been satisfied.

Defendants also contest this interpretation, arguing that the Magistrate Judge erroneously concluded that Dr. Ronald

Weber, expert for Defendants, conceded that their was legally significant white bloc-voting such that the third *Gingles* precondition was satisfied. In support, Defendants cite, at length, Dr. Weber's deposition testimony and intimate that Plaintiffs' belabored a line of questioning concerning white-bloc voting to which Weber consistently answered that none existed to a legally significant degree. However, it is clear from the recited passages that the Magistrate Judge properly interpreted Dr. Weber's answers as a concession of the third *Gingles* precondition.

Defendants rely in part on the following exchange between the attorney for the United States and Dr. Weber:

> A: I say: The candidates of choice of nonwhite voters are not usually defeated due to white block voting but due to partisan voting.
>
> Q: When you use the word due there, are you saying that partisanship is a cause?
>
> A: There is an implication of cause. I did not say are not usually defeated because of white block voting, but because of partisan voting.

(Weber Dep. at 119-20).

Defendants argue that this exchange demonstrates that Dr. Weber "repeatedly emphasized that these election patterns were not legally significant white racial bloc voting, and repeatedly rejected the suggestion made through repetitive questions posed by the United States that minority or nonwhite voters were usually defeated due to white bloc voting." (Def.s' Obj. at 6). The Court disagrees.

It is apparent from Dr. Weber's deposition testimony that he rejected the conclusion that legally significant white-bloc voting occurred in **Charleston County** because he attributed the polarization to partisan differences rather than racial

ones:

> Q: There about middle ways down in paragraph Arabic Number 4, you state: For the most part, however, these are elections where whatever racial polarization in voting exists is not politically or legally consequential in that the candidates of choice of nonwhite voters are not usually defeated due to white block voting, but due to partisan voting.
>
> A: Yes, sir.

(Weber Dep. at 114).

Issues of causation, however, are not relevant to the issue of white bloc-voting. The third precondition requires only that "the minority ... demonstrate that the white majority votes sufficiently as a bloc to enable it-- in the absence of special circumstances, such as the minority candidate running unopposed, usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51 (citation omitted). Importantly, the United States Supreme Court in its plurality opinion expressly stated that "[f]or purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent." *Gingles*, 478 U.S. at 62. Rather, racially polarized voting "means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is it refers to the situation where different races ... vote in blocs for different candidates." *Id.* More specifically, the Supreme Court defines racial polarization as "a consistent relationship between [the] race of the voter and the way in which the voter votes, or to put it differently, where black voters and white voters vote differently." *Id.* at 53 n. 21 (internal citations and quotations omitted). As the Magistrate rightly noted, the Fourth Circuit Court of Appeals agrees that "the best reading of the several opinions in *Gingles*, is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, ... but relevant

in the totality of circumstances inquiry." *Lewis v. Alamance County, North Carolina*, 99 F.3d 600, 615 n. 12 (1996). Defendants ask the Court to revisit the Fourth Circuit's conclusion in *Lewis* and find instead that causation is in fact relevant to the third *Gingles* precondition. (Def.s' Obj. at 19). The Court, however, declines to entertain Defendants' request to reconsider *Lewis*, not simply out of deference to *stare decisis* but because the Court wholly concurs with the Fourth Circuit's interpretation of *Gingles*.

Dr. Weber's conclusion that the polarization of voters is caused by partisan differences, therefore, is simply not relevant to whether the third precondition has been satisfied. The above cited testimony crystalizes the confusion Defendants' have over the Magistrate Judge's interpretation of Dr. Weber's answers. While Defendants and Dr. Weber appear convinced that inquiry into the third precondition includes questions of causation, the Magistrate Judge rightly ignored such answers and instead focused on Dr. Weber's answers to a more narrowly tailored hypothetical, used by Plaintiffs' attorney to focus Dr. Weber on the relevant inquiry of white-bloc voting *without regard to cause*. Defendants contest the hypothetical for failing to properly consider the entire law of a Section 2 case, including cause. Their objection, however, as stated, misapprehends the specific inquiry this Court must make into white-bloc voting. The hypothetical and corresponding dialogue are quoted in relevant part:

> Q: Let me ask you a hypothetical. Assume that to carry our burden under the ... third *Gingles* preconditions, we, the plaintiffs, must prove the following: ... that usually white voters vote for candidates different than the ones preferred by minority voters, and the candidates supported by the white voters win. Okay?
> A: Okay.

Q: Further assume that all the plaintiffs have to prove--that's all the plaintiffs have to prove in a Section 2 case and that we do not have to prove that the reason or the cause of the polarization is race. Okay?
A: Um-hum.
Q: If that is the correct legal standard, based upon the hypothetical question that I've given you, and based upon your study in this case, using your working rules, isn't it true that the Court would conclude that voting is racially polarized in County Council questions?
[Defense counsel, Mr. Griffith objects to the question for omitting material required elements of a Section 2 case.]
By Mr. Coates: I'm not asking about whether or not we win. Mr. Griffith is correct. My question is only on the basis of that standard. If the Court decides that that standard is correct rather than the one that you've suggested in your report, then based upon your studies in this case, isn't true that the Court would conclude that voting is racially polarized in **Charleston County** for County Council elections?
[Defense counsel objected again.]
The Witness: Yeah I mean -
By Mr. Coates:
Q: I can ask it again if you want.
A: No, you don't need to ask it again because I clearly understand it. The difficulty I have is, you know, it's a hypothetical. So I'll accept it as a hypothetical because that is not the law. The law is totality of circumstances. It's been totality of circumstances in all these Section 2 cases.
Q: My question is simply on the issue of racial polarization.
A: On the simplistic notion that is involved in the preconditions of *Gingles,* your case would continue to be alive because you have met the first prong. You can demonstrate, based on my analysis, that you can draw one

district that is African-American in voting majority. You've got cohesion on the part of the minority community; and the preferences, be they Republican or whatever they are, where white voters do not support the Democrats, where the candidates of choice of the African-Americans are not white voters. So your case would continue to be alive to go with the totality of circumstances.

Q: And another way of saying that is based upon--if that is the correct standard in my hypothetical, based upon your studies and your working rules of the evidence would indicate that there is racial polarization in elections for **Charleston County** Council?

A: There are racial difference in voting, not racial polarization.

(Weber Dep. at 139-42)

The hypothetical was Plaintiffs attorney's attempt to separate the element of causation from Dr. Weber's conclusions regarding the third precondition. As stated, Dr. Weber believes that the stratification of white and black voters in **Charleston County** is a consequence of partisan differences as opposed to racial differences and he repeatedly insisted on this conclusion notwithstanding Plaintiffs attorney's attempt to focus the inquiry, as is consistent with the law regarding the third precondition, on the issue of polarization *regardless of cause.* The hypothetical simply forced Dr. Weber to concede, regardless of his personal interpretation of the law, that the preconditions of *Gingles* were satisfied on the facts of this case and that the totality of the circumstances inquiry was all that remained. Not only was the Magistrate Judge correct in his interpretation of Dr. Weber's answers, but Plaintiffs attorney acted properly in pursuing the line of questions as he did.

V. Objections as to Plaintiffs' burden of proof

Finally, Defendants make a series of objections in regards to Plaintiff's alleged failure to satisfy their burden of proof as to the third *Gingles* precondition. While the Court finds that Dr. Weber's express concession eliminates any issue of fact as to the third precondition, (as all experts therefore agree it has been satisfied), out of an abundance of caution, the Court makes the following additional remarks in response.

First, Defendants proffer what the Court would characterize as rather anecdotal, deposition testimony of candidates who testify to being minority- preferred candidates. (See Def.s' Obj. at 10-13). The Court finds such evidence to be generally unpersuasive. Even assuming, as the Court must, that such perceptions were true, "minority-preferred candidate" means something more quantitative than simply what an individual candidate may or may not perceive about him or herself in regards to the preferences of voters. Rather, the Court will focus on the weight of the statistical data presented in Dr. Weber's and Dr. Arrington's respective reports regarding the electoral success, failure, and classification of minority-preferred candidates.

Next, Defendants contend that Plaintiffs, in contradiction of the Fourth Circuit decision in *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir.1996), "excluded 30 years of primary elections from its analysis, including those in which the minority-preferred candidate won and those in which he or she did not, and [that] the Magistrate disregarded such overwhelming evidence altogether." (Def.s' Obj. at 13). It is true that *Lewis* clearly warns, "results in these two phases [primary and general] of the single election cycles must be separately considered and analyzed." *Lewis*, 99 F.3d at 616. However, the express purpose of such inquiry is to avoid the risk of "masking regular defeat in one of these phases with

repeated successes in the other, and thereby misperceiving a process that is palpably in violation of the Voting Rights Act, as not violative of the Act at all." *Id.* To illustrate, the Fourth Circuit stated:

> an at-large voting method under which the candidates preferred by the minority community are always successful in the primary election but, because of white bloc voting, are always defeated in the general election ..., is a voting method under which minorities are, because of white bloc voting, always unsuccessful in attaining elective office.
> *Id.*

The Fourth Circuit reasoned that "[b]y aggregating primary and general elections ... a court would ineluctably find in both circumstances that minority-preferred candidates were successful fifty percent of the time, and therefore not 'usually' defeated by white bloc voting." *Id.* Ironically, that is precisely the conclusion that Defendants' ask the Court to make in the instant case. Notwithstanding their own expert's conclusion that minority preferred candidates lose in general elections to a legally significant degree, Defendants would have the Court consider success of minority preferred candidates in primary elections as evidence that racial polarization does not occur. This is precisely the type of aggregation of evidence of which the Fourth Circuit warned and in which the Court will not participate. To do otherwise and weigh primary success more heavily in the Court's calculus, would improperly dilute the experts' statistically-derived conclusion that regardless of primary successes in **Charleston County**, minority-preferred candidates continue to experience legally significant defeat in general elections. (See, e.g., Weber Report at 53-54). Although the Court is unpersuaded to change its conclusion, it should be noted that the expert Reports include data regarding primary elections which the Court has thoroughly considered.

Defendants also strangely contend that the "effective result of ignoring a thirty year history of electoral success by minority-preferred candidates was to assumes [sic] that the only candidates who can be labeled 'minority- preferred candidates' are members of the minority, and to indulge in racial stereotyping that tramples on the principles embodied in the Equal Protection Clause." (Def.s' Obj. at 13). To begin, even if thirty years of electoral success had been ignored, it does not necessarily follow that Plaintiffs' or the Magistrate therefore assumed that "only candidates who can be labeled 'minority-preferred candidates' are members of the minority," (id.). Moreover, the allegation is completely unsubstantiated, as the record proffered by Plaintiffs and reviewed by the Magistrate Judge and this Court includes every general election contest for **Charleston County** Council from 1988 to 2000, as analyzed by Defendants' own expert, regardless of the race of the minority- preferred candidate or the race of his or her opponent. The objection is without merit.

Defendants also contest Plaintiffs alleged reliance on the bivariate ecological regression analysis for the estimation of voter candidate- preferences. Defendants rightly note that the method has been criticized. *See* Lewis, 99 F.3d 600(1996). The Fourth Circuit in *Lewis* cautioned against "overreliance on bivariate ecological regression analysis in the estimation of voter preferences ... [because] [b]ivariate regression analysis ... only allows one to determine the correlation between the percentage of the vote received by a particular candidate and the racial composition of precincts." Id. at 605 n. 3. The Fourth Circuit concluded that in a sense "the bivariate ecological regression analysis merely assumes that which it is the purpose of the analysis to prove." *Id.* Notwithstanding the Fourth Circuit's cogent warning, the

Supreme Court has previously endorsed both the bivariate ecological regression and the extreme case statistical methods. *Gingles*, 478 U.S. at 52-61. More important, experts for Plaintiffs and Defendants prudently employed both statistical methodologies. Defendants have not explained how, or even alleged that, conclusions regarding voter preferences are different under the extreme case method as opposed to those reached using bivariate ecological regression. In fact, the Court has reviewed the statistical data produced by each method and finds the results to be consistently within 1-3 percentage points of each other. (Attachment JCR-4). Dr. Weber expressly acknowledges that he used both methods, (Weber Report, dated October 8, 2001, at 12), and yet draws no distinctions in the conclusions drawn from each. Ultimately, to the extent the bivariate ecological regression methodology may have yielded "self-fulfilling" statistical data in this case, the Court's conclusions remain shielded from overreliance upon such deficiencies by the expert's complimentary use of both methods.

VI. Additional findings as to the third *Gingles* precondition

As stated, Dr. Weber's express concession that the third *Gingles* precondition has been satisfied eliminates any issue of fact as to the existence of white bloc-voting. However, the Court highlights the following statistical conclusions as clearly satisfying Plaintiffs' burden of proof as to the third *Gingles'* precondition:

> 1. As far as polarization in voting between the two groups is concerned, I find that in 25 of the 33 elections, there was evidence of polarization in voting (about 75.8 percent of the elections were polarized) in that non-white voters preferred Democratic candidates, while white voters preferred Republican candidates.
> (Weber Report, dated October 8, 2001, at 53).

2. ... in 78.6 percent of elections where non-white voters acted cohesively, the group was defeated in electing a candidate of choice to the County Council office.
(Id. at 54).
3. ... white voters were cohesive ... in 31 of the 33 elections.
(Id. at 42).

"There is no simple doctrinal test for the existence of legally significant racial bloc voting." *Gingles*, 478 U.S. at 58. The Fourth Circuit has stated that the third *Gingles* precondition is not satisfied simply by a showing that "the white bloc voting defeats the minority-preferred candidate more often than not." *Lewis*, 99 F.3d at 606 n. 4. "[S]uffice it to say that [it] mean[s] something more than just 51%." *Id.* The Fourth Circuit referenced Justice O'Connor's conclusion that a finding of " 'usually defeated' should be based on a success rate by minority-preferred candidates that is less than proportional representation, although greater than mere tokenism." *Id.*

As a guidon, the Supreme Court has stated that "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election" and that "the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting." *Gingles*, 478 U.S. at 57.

In the instant case, the Court finds the statistical data over the most recent 12 year period to be uniformly significant: cohesion in white voting eclipsed 90%; non-white voters were defeated in 78.6% of the elections where they acted cohesively; and elections were polarized in excess of 75% of

endogenous, general elections considered. The Court concludes that by any measure these numbers are legally significant. Moreover, Dr. Weber, Defendants' own expert, has admitted that on the basis of these findings, Plaintiffs' "case would continue to be alive to go with the totality of circumstances." (Weber Dep. at 142).

Dr. Weber only argues that these statistics do not "produce a picture of legally significant vote dilution" because they are "attributable to race- neutral causal factors." (Weber Report, dated October 8, 2001, at 54). As stated, however, causation is irrelevant to the inquiry.

Although Defendants now also contest the span of years analyzed as deficiently short, it was their own expert that intentionally limited the elections considered to those most recent, while experts for Plaintiffs considered elections from 1984 to 2000. Defendants' expert purposefully declined to consider pre-1988 elections "because numerous Federal courts have held that recent elections for endogenous offices are the most probative in determining vote dilution ...." (Weber Report, dated October 8, 2001, at 9-10). The Court agrees that the most recent elections are most probative. *See, e.g.,* Ruiz v. City of Santa Maria, 160 F.3d 543, 555 (9th Cir.1998); *Uno v. City of Holyoke*, 72 F.3d 973, 990 (1st Cir.1995); *Meek v. Metropolitan Dade County, Fla.*, 985 F.2d 1471, 1482-83 (11th Cir.1993). In fact the Supreme Court in *Gingles* affirmed the district court's finding of a Section 2 violation on the strength of only three election cycles. *Gingles*, 478 U.S. at 52.

The record considers 33 probative, endogenous, general elections. The Court concludes that in a legally significant portion of those elections white bloc- voting was sufficient to defeat the combined efforts of non-white voters and any

white crossover votes. Defendants' expert admits no less. Accordingly, Plaintiffs' motion for summary judgment as to the third precondition is granted.

CONCLUSION

It is, therefore,

ORDERED, for the foregoing reasons that the Court adopts in whole the Report and Recommendation of the Magistrate Judge and incorporates the Report by specific reference into this Order. It is further ORDERED that Plaintiffs' Motion for Partial Summary Judgment is GRANTED.

AND IT IS SO ORDERED.

REPORT AND RECOMMENDATION

CARR, United States Magistriate Judge.

*1 These actions were brought on January 17, 2001, by The United States of America and several individual Plaintiffs against **Charleston County**, South Carolina (the County), the **Charleston County** Council (County Council), the **Charleston County** Election Commission, and several individual Defendants under Section 2 of the Voting Rights Act of 1965, as amended June 29, 1982. 42 U.S.C. § 1973[1], (hereinafter " § 2"), to cure alleged vote dilution caused by the existing at-large method of election for seats on County Council. Discovery was completed in a reasonably expeditious and cooperative manner; mediation has been unsuccessful, and the parties are ready for trial. Three pending motions have been referred for a Report and

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[1] As amended in 1982, Section 2 of the Voting Rights Act of 1965, provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2), as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Recommendation to the undersigned United States Magistrate Judge by United States District Judge P. Michael Duffy; the motions are: the Plaintiffs' motion for partial summary judgment on the *Gingles* factors; the Defendants' motion for summary judgment on the third *Gingles* factor and the totality of circumstances and the Plaintiffs' motion for a preliminary injunction to halt or to impose an interim voting plan for the June 11, 2002, primary election for five open seats on the **Charleston County** Council.

Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuine issue exists when there is sufficient evidence "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A party opposing a properly supported summary judgment motion bears the burden of establishing the existence of a genuine issue of material fact. *See, e.g., id.* at 248-49, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202.

The Supreme Court has stressed that Rule 56 mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548, 91 L.Ed.2d 265. In reviewing a grant of summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *See, e.g., Cox v. County of Prince William*, 249 F.3d 295, 299 (4th Cir.2001).

However, a nonmoving party may not meet its burden by resting upon mere allegations or bald assertions in the pleadings. Instead, the "party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see also, Celotex,* 477 U.S. at 324, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505, 91 L.Ed.2d 202. Rule 56 requires that a nonmoving party's supporting affidavits be based on personal knowledge and set forth facts that would be admissible in evidence at a trial. Fed.R.Civ.P. 56(e). Therefore, statements based solely on information and belief do not satisfy the requirements of Rule 56. *See, e.g., Toro Co. v. Krouse, Kern & Co.,* 827 F.2d 155, 162 & n. 3 (7th Cir.1987); *Minn. Mining & Mfg. Co. v. United States Rubber Co.,* 279 F.2d 409, 415 (4th Cir.1960). Likewise, hearsay statements, which would be inadmissible, do not meet Rule 56's standards. "Mere speculation by the non- moving party cannot create a genuine issue of material fact" sufficient to survive a motion for summary judgment. *Cox,* 249 F.3d at 299.

§ 2 of the Voting Rights Act of 1965

***2** Section 2(a) of the Voting Rights Act of 1965, 42 U.S.C. § 1973(a), prohibits a State or its political subdivisions from imposing any voting practice in a manner which results in denial or abridgement of the right of any citizen of the United States to vote on account of race or color. Following the plurality decision of the United States Supreme Court in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which required proof in voting rights cases of actual intent to discriminate against minority voters, Congress passed the 1982 Amendments to the Voting Rights Act of 1965 including amendments to § 2(b) to restore the "results test," the legal standard that governed voting

discrimination cases prior to *Mobile v. Bolden, Id.* Under the "results test," Plaintiffs were not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose. In restoring the "results test" Congress essentially provided that Plaintiffs could prevail in a voting rights case by showing that, under the totality of the circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process.

The Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), construed for the first time § 2 and concluded,

> The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multimember districts and at-large voting schemes may " 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population." '.... The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.... Multimember districts and at-large election schemes, however, are not per se violative of minority voters' rights.... Minority voters who contend that the multimember form of districting violates § 2, must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates.

478 U.S. 30, 106 S.Ct. 2752, 2764-2765, 92 L.Ed.2d 25 (citations and footnotes omitted).

While recognizing that § 2 requires consideration of the totality of the circumstances, many of which are listed in S.Rep. No. 97-417, at 28-29, 97th Cong.2nd Sess. 28 (1982), U.S.Code Cong. & Admin. News 1982, pp. 177, 206-207 (hereinafter S.Rep.), the court concluded that unless there is a conjunction of three circumstances, known as the *Gingles* preconditions, the use of multi-member districts generally will not be violative of § 2. *Gingles* at 2766.

Ultimately in this case the court must assess the impact of the multi-member and at-large electoral structure in **Charleston County** Council elections on minority electoral opportunities using objective factors reflecting the totality of the circumstances.

Plaintiffs' Motion for Partial Summary Judgment On the First, Second and Third *Gingles* Preconditions

***3** The United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), concluded that three circumstances are necessary preconditions for multi-member districts to operate to impair minority voters' ability to elect representatives of their choice.

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the multi-member form of the district cannot be responsible for minority voters' inability to elect its candidates. Cf. *Rogers*, 458 U.S., at 616, 102 S.Ct., at 3275. See also, Blacksher & Menefee 51-56, 58; Bonapfel 355; Carpeneti 696; Davidson 4; Jewell 130. Second, the minority group must be able to show that it is politically

cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multi-member electoral structure thwarts distinctive minority group interests. Blacksher & Menefee 51-55, 58-60, and n. 344; Carpeneti 696-697; Davidson 4. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed, see, infra, at ---, and n. 26--usually to defeat the minority's preferred candidate. See, e.g., Blacksher & Menefee 51, 53, 56-57, 60. Cf. *Rogers*, supra, at 616-617, 102 S.Ct., at 3274-3275; *Whitcomb*, 403 U.S., at 158-159, 91 S.Ct., at 1877; *McMillan v. Escambia County, Fla.*, 748 F.2d 1037, 1043 (C.A.5 1984). In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.
478 U.S. 30, 106 S.Ct. 2752 at 2766-2767, 92 L.Ed.2d 25

The Plaintiffs here assert that there is no genuine issue of material fact as to the existence of these three preconditions. They note that their experts confirm the existence of the pre-conditions as does the defendants' expert. However, in accord with summary judgment standards at oral arguments, the Plaintiffs' relied primarily on the deposition testimony the Defendants' expert, Dr. Ronald E. Weber. The Defendants oppose the motion as to all three pre-conditions and have also moved for summary judgment on their own part as to the third pre-condition.

First Pre-Condition The Minority Group Must Be Able to Demonstrate That It Is
Sufficiently Large And Geographically Compact To Constitute A Majority In A
Single-Member District.

The purpose of this pre-condition was explained authoritatively by the Fourth Circuit Court of Appeals in the unpublished decision of *Gause v. Brunswick County, N.C.* 92 F.3d 1178 (Table, Text in WESTLAW), Unpublished Disposition, 1996 WL 453466, ----2:

> "The reason that a minority group making a [vote dilution] challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles,* 478 U.S. at 50-51 n. 17 (emphasis in original). In other words, minority voters must show that their votes have been diluted by discriminatory elements of the election process, and not simply that their votes are dilute. See *DeGrandy,* 114 S.Ct. at 2659-60; *McNeil,* 851 F.2d at 946. "[T]he adverse 'result' for which [Section 2] seeks a remedy must be traceable ultimately to the impact of 'a certain electoral law, practice, or structure interact[ing] with social and historical conditions." ' *McGhee,* 860 F.2d at 117 (quoting *Gingles,* 478 U.S. at 47) (emphasis supplied).
>
> ***4** 1996 WL 453466, ----2.

In the case at bar virtually every expert agreed that the first precondition is satisfied. Dr. Ronald E. Weber, the **Charleston County** Council's expert witness, testified in deposition on November 28, 2001, as follows:

> Q. And if a district can be created that's compact and constitutional and has a majority of minority voters in it and one such district can be created in the jurisdiction under challenge, does that, in your opinion, satisfy the first Gingles precondition?

A. Yes.
Q. And were you able to create a majority black compact district in **Charleston County** in which black people were the majority of voters living in that district?
A. Yes.
Q. And would you agree with me that on the basis of your work in this case that the first Gingles precondition is satisfied in **Charleston County**?
A. Yes, it is satisfied.
Weber Dep. at p. 15 l. 8-24.

Dr. Theodore Arrington, the Plaintiffs' expert, concluded that three such single member majority black districts could be drawn in **Charleston County**. Arrington Rep. at 43-46, Table 17, & App. D. On March 20, 2002, a three judge panel of this court issued its Order in *Colleton County Council v. McConnell,* No. 01-3581, establishing a redistricting plan for the South Carolina Senate which creates at least one predominantly black district wholly within **Charleston County**.

At oral arguments, **Charleston County** Council took the position that the black population of **Charleston County** was so integrated within the white population or was so small in relation to the surrounding white population that it could not constitute a majority in a single member district. Further it presented an affidavit from Dr. Weber[2] dated March 26, 2002, contradicting his deposition testimony and stating, "It is my opinion that the United States cannot carry its burden of proving the first *Gingles* precondition of geographical compactness." Weber Declaration ¶ 4. Further he explained that while the black majority single member

[2] The Plaintiffs' objected to Dr. Weber's affidavit as contradictory to his deposition and presented after the close of discovery. The objection is well taken.

district which he had drawn had been drawn in a color-blind manner, it might be subject to constitutional challenge because it was drawn without giving consideration to maintaining identified communities of interest, or other districting principles such as keeping political subdivision boundaries. While he accurately asserts that the first *Gingles* precondition cannot be met by presenting a district which would not survive subsequent constitutional examination on other grounds, he only surmises that the color-blind, black majority single member district which he drew would not pass constitutional scrutiny because he did not consider other constitutional requirements in drawing it. Indeed at oral argument the Defendants asserted that Dr. Weber had not been asked to make such an evaluation of the single member district he drew, and he has not made such an evaluation.

This ad hoc speculation by Dr. Weber is insufficient to avoid summary judgment. First, the law in this circuit is clear that a party cannot avoid summary judgment by filing affidavits that contradict the affiant's own prior testimony. *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 438 (4th Cir.1999) ("we have consistently held that a party cannot create a triable issue in opposition to summary judgment simply by contradicting his deposition testimony with a subsequent affidavit"). In *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 975 (4th Cir.1990), the court held that where an affidavit conflicts with a witness's prior testimony, "the affidavit should be disregarded as a sham issue of fact." Second, though the burden of proof rests initially with the moving party, when a motion for summary judgment is made and supported as provided in Rule 56, the nonmoving party must produce "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). *See, First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

Genuineness means that the evidence must create fair doubt; wholly speculative assertions such as those presented in the Weber affidavit will not suffice. *See,* Cole v. Cole, 633 F.2d 1083, 1089 (4th Cir.1980); *Atlantic States Construction Co. v. Robert E. Lee & Co.*, 406 F.2d 827, 829 (4th Cir.1969).

***5** A review of this record reveals no evidence on which a reasonable jury could rely to return a verdict for the nonmoving party on the first *Gingles* pre-condition.

Second And Third Pre-Condition The Minority Group Must Be Able To Show (2) That It Is Politically Cohesive And (3) That The White Majority Votes Sufficiently As A Bloc To Enable It Usually To Defeat the Minority's Preferred Candidate.

The second and third preconditions are generically referred to as a showing of racially polarized voting. Justice Brennan delivering the opinion of the court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 2756, 92 L.Ed.2d 25 (1986), explained the importance of the two conditions as follows:

> The relevance of the existence of racial bloc voting to a vote dilution claim is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate. Thus, the question whether a given district experiences legally significant racial bloc voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and consequently establishes minority bloc voting within the meaning of § 2. And, in general, a white

bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election. In a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one election or a few elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election. Here, the District Court's approach, which tested data derived from three election years in each district in question, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper standard for legally significant racial bloc voting.
478 U.S. 30, 106 S.Ct. 2752, 2756, 92 L.Ed.2d 25.

Once again the Plaintiffs rely on the testimony of the Defendants' expert, Dr. Weber, who conceded both points. With regard to whether minority group members constitute a politically cohesive unit he allowed:

Q. If you apply your working rules, would you agree with me that the second Gingles precondition is satisfied in this case on the basis of the elections that you have looked at?
***6** A. We have cohesion on the part of nonwhite voters in support of Democratic candidates irrespective of whether or not the Democratic candidates are African-American or white.

Q. If the second--if I'm defining the second Gingles precondition correctly, and I'm defining it as proof of minority voter cohesion, wouldn't you agree with me that applying your rules, based upon your analysis, that that second precondition is satisfied in **Charleston County**?
A. Yes, but I want the record to reflect that it's cohesion in support of Democratic candidates.
Q. Okay. And do you know of any case authority since Gingles or before Gingles that says that if the minority cohesion that you look for under the second precondition is in favor of candidates of one party, that that doesn't count in satisfying the second precondition?
A. No, but-
Q. That wouldn't make any sense, would it?
A. No, it wouldn't make any sense. But the point I make about the partisanship is because when we get to the third precondition, we're going to discover that the other group prefers the other party. And that involves the issue of whether it's partisanship or race that's underlying the differences between the two groups.
Q. If you said that cohesion on the part of minority voters did not count if they were always cohesive in support of one party, then African-American voters would, as a practical matter, never satisfy the second Gingles precondition, would they, in the South because almost always their cohesion is behind Democratic party candidates; correct?
A. Everywhere in the country. In the general election, they are cohesive. African-American or nonwhite voters are cohesive behind Democratic candidates.
Q. The fact that that happens in **Charleston County** makes **Charleston County** no different than any other jurisdiction that you know of in the country; correct?
A. That is correct, yes, no different.
Q. Isn't it the case that candidates of choice of African-

American voters are usually defeated in **Charleston County** Council general elections?
A. Candidates of choice of minority voters are usually defeated, yes.
Weber Dep. at p. 73-75.

With regard to the block voting by white voters, Dr. Weber testified,

Q. My question is simply on the issue of racial polarization.
A. On the simplistic notion that is involved in the preconditions of Gingles, your case would continue to be alive because you have met the first prong. You can demonstrate, based on my analysis, that you can draw one district that is African-American in voting majority. You've got cohesion on the part of the minority community; and the preferences, be they Republican or whatever they are, where white voters do not support the Democrats, where the candidates of choice of the African-Americans are not white voters. So your case would continue to be alive to go with the totality of circumstances.
Weber Dep. at p. 142.

To be sure Dr. Weber believed that racial polarization was an inappropriate term and that racial differences should be substituted; he nonetheless conceded that "[o]n the simplistic notion that is involved in the preconditions of Gingles," the Plaintiffs' burden was met.

*7 Furthermore statistics presented by Dr. Weber and Dr. Arrington indicated that majority white voting is sufficient to usually defeat the combined minority voting plus white "crossover" votes in **Charleston County**. *See,* Weber Rep. at 39-41 (From 1988 to present in endogenous general and special elections 79% of the minority preferred candidates,

regardless of the candidate's race, lost the election), Arrington Rep., App. B, Table 55 (In 1989 referendum 99% of the minority vote was defeated by 76% of the white vote). Finally, in *Colleton County Council v. McConnell,* No. 01-3581, racial polarized voting was not seriously in dispute, and this court noted, "Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting." Slip op. p. 46-47.

During his deposition and in his post hoc affidavit, Dr. Weber takes the position that the polarized voting is not based upon race, but is based on a number of other factors which he generally alluded to but among which partisanship is cited predominantly. He also takes the opportunity to challenge the statistical analysis of the Plaintiffs' expert using the bivariate ecological regression analysis. Indeed in his affidavit Dr. Weber states, "Because most non-white voters are Democrats and there is a pro-Republican tilt among white voters, there appears to be a strong correlation between the race of the voter and the partisan choice of the voter." Weber Declaration ¶ 9. In other words, the polarization is because of political persuasion rather than race.

This argument as it relates to the third *Gingles* precondition is not relevant in this circuit. The Fourth Circuit Court of Appeals in *Lewis v. Alamance County, North Carolina,* 99 F.3d 600 (1996), rejected just such an argument on the strength of *Gingles* stating,

> [U]nder Plaintiffs' theory, the district court would be required, contrary to *Gingles,* to assess the cause of the minority community's support of the candidate in

determining whether the minority-preferred candidates usually are defeated by white bloc voting. See infra note 12. In *Gingles,* defendants argued that the Plaintiffs were required to use multiple regression analysis, rather than bivariate regression analysis, to ensure that only those defeats of black-preferred candidates that were actually caused by race, and not some other reason such as party affiliation, were considered defeats of black- preferred candidates for purposes of a vote dilution claim. The *Gingles* plurality explicitly rejected such a requirement in the context of assessing the second and third *Gingles* preconditions. 478 U.S. at 62, 106 S.Ct. at 2772. [FN12]

FN12. Although only a four-Member plurality joined Section III(C) of the opinion, in which the rejection of defendant's multiple regression claim is found, Section III(C) is lengthy, and the dispute that cost Justice White's vote on the section was not over the "cause" issue. Although most of our sister circuits have by now adopted the position that an inquiry into cause is relevant, see, e.g., *LULAC,* 999 F.2d at 850 ("[The] rigorous protections [of the Voting Rights Act], as the text of § 2 suggests, extend only to defeats experienced by voters 'on account of race or color." '), they are still in disagreement about the stage in the vote dilution inquiry in which causation evidence is appropriate, compare *Nipper,* 39 F.3d at 1515 ("[I]f the evidence shows, under the totality of the circumstances, that the community is not motivated by racial bias in its voting patterns, then a case of vote dilution has not been made."), *with Clarke,* 40 F.3d at 812-14 (considering "cause" of the success rate of black-preferred candidates in assessing third *Gingles* element). We think the best reading of the several opinions in *Gingles,* however, is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, *see* *Gingles,* 478 U.S. at 62, 106 S.Ct. at 2772 (Brennan, J., plurality opinion), but relevant

in the totality of circumstances inquiry, see 478 U.S. at 100, 106 S.Ct. at 2792 (O'Connor, J., concurring in judgment) (agreeing that use of racial polarization data "solely" to prove *Gingles* second and third elements cannot be rebutted by "evidence that the divergent racial voting patterns may be explained in part by causes other than race," but disagreeing with plurality's claim "that such evidence can never affect the overall vote dilution inquiry."). Of course, whether causation is relevant to the second and third precondition inquiries or to the totality of circumstances inquiry, it would be just as relevant for determining whether particular minority-preferred candidates lose for some reason other than racial polarization, as it would be for determining, as Plaintiffs urge, whether particular minority-preferred candidates win merely because of party affiliation.
***8** 99 F.3d 600, 615.

Here viewing the Defendants' own expert testimony all but one of the 23 losing nonwhite candidates of choice lost to a candidate who received 60% or more of the white votes, a level which Dr. Weber described as white cohesion. As Dr. Weber conceded, "Candidates of choice of minority voters are usually defeated." Weber Dep. p. 75, l. 145-146.

Accordingly, in Dr. Weber's words, "So [the Plaintiffs'] case would continue to be alive to go with the totality of circumstances." Weber Dep. at p. 142.

Defendants' Motion for Summary Judgment On The Third *Gingles* Precondition
[3]And Totality Of Circumstances

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[3] Given the above discussion on the Plaintiffs' motion with regard to the *Gingles* third precondition, it is not necessary to discuss it further here.

In accord with the requirements of § 2, the court must consider the totality of the circumstances in deciding whether there has been a violation of the Voting Rights Act. The Senate Report contains a non-exclusive listing of circumstances (hereinafter, "The Senate factors") to be considered, and the Supreme Court in *Gingles* listed them as follows:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of Plaintiffs' evidence to establish a violation are: "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of

the members of the minority group, "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. S.Rep., at 28-29, U.S.Code Cong. & Admin.News 1982, pp. 206-207.
Gingles 478 U.S. at 37, 106 S.Ct. at 2759.

The Defendants' assert in this motion that there is no genuine issue of material fact concerning the totality of the circumstances and that they are entitled to judgment as a matter of law.

***9** Consideration of the totality of the circumstances is a highly fact intensive inquiry, and a cursory review of the factors listed in the Senate Report reveals disputes which may only be resolved by the ultimate fact finder. The Senate factors with examples of genuine issues of material fact or other matters for consideration by the fact finder follow.

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.

The Defendants concede that **Charleston County** and the State of South Carolina have histories of official discrimination, but dispute that it continues today to impede the right of the members of the minority group with regard to voting.

The Plaintiffs point to testimony to the contrary. For example, **Charleston County** Elections Commission Attorney from 1968 until 1997, Joseph Mendelsohn, testified that he dealt with a consistent pattern of harassment at predominantly black precincts "in every single election we

had." Mendelsohn Dep. p. 31. Similarly current **Charleston County** Elections Commissioner Carolyn Collins testified that there was usually an attempt made to have both Democratic and Republican poll watchers at each precinct, but because of a small number of black Republican poll watchers, the Republican poll watcher in predominantly black precincts was often white. On the other hand there were some predominantly white precincts where there was never a black poll watcher. Collins testified that there were some white poll managers who felt uncomfortable being in a predominantly black precinct. Accordingly white poll watchers for black precincts were selected for their "tendency to be aggressive and assertive in a black environment." Collins Dep. p. 44. She further testified that black voters reported being intimidated or harassed by the white poll watcher.

While this evidence and other similar evidence alone does not prove the Plaintiffs' case, it creates a sufficient issue for resolution by a fact finder.

2. The extent to which voting in the elections of the state or political subdivision is racially polarized.

"Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting." *Colleton County Council v. McConnell,* No. 01-3581, Slip op. p. 46-47 (March 20, 2002).

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting

practices or procedures that may enhance the opportunity for discrimination against the minority group.

The Plaintiffs as the non-moving parties presented undisputed evidence that **Charleston County** is one of the largest and most populated counties in the state and the cost and logistical problems of running a county wide race fall most heavily on the minority candidate. Thus the **Charleston County** Council method of election enhances the opportunity for discrimination against the economically disadvantaged minority group. *See,* Amos-Frazier Dep. at 79-80 (the amount of money it takes to run and get your name out there over this county, the average African-American does not have that kind of money in their campaign to do it.); Floyd Dep. at 71. (Running county wide is hard, it's expensive).

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process.

***10 Charleston County** does not use a slating process, so this factor is not relevant.

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.

The Defendants' expert concedes that African-Americans in **Charleston County** participate in the political process at lower rates than whites in **Charleston County**, and the evidence cited in the Plaintiffs' brief concerning the effects of discrimination is undisputed. "According to the 1990

Census, which is the most recently available Census data regarding socio-economic matters, socioeconomic disparities divide white and black residents of **Charleston County**... 70.3% of **Charleston County's** citizens living in poverty are black... Black per capita income is less than half of that earned by whites: $7, 106 vs. $16,339... Black median family income also trails that of white families by more than half $18,603 vs. $38,052... Over 31% of black families live below the poverty line versus 5.0% of white families... Similarly, more than a third of **Charleston County's** black persons (34.2%) live below the poverty line versus 7.9% of the County's white persons... Over 41% of the County's black residents have income levels below 125% of the poverty level versus 10.6% of the County's white residents... Moreover, approximately one of every six black families (16.9%) in **Charleston County** receive public assistance income; conversely, approximately one of 50 white families (2.3%) receive such assistance." Plaintiffs' Memorandum In Support of Its Motion, p. 34.

6. Whether political campaigns have been characterized by overt or subtle racial appeals.

Again the undisputed evidence from the Plaintiffs is that non-minority candidates have displayed photos of their black opponents prominently in campaign literature and sometimes darkened pictures to emphasize the racial distinction. *See,* B. Fielding dep. at 51-52, 76-77, 236-38; Fowler dep. at 129-31; Runyon dep. at 103-04; dep. of former N. Charleston NAACP president Ed Bryant at 197-99, 200-01.; dep. of State Senator McKinley Washington at 75-76; Rosen dep. at 82-83.

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

The evidence here is undisputed. In considering endogenous elections, that is those elections for County Council, since 1988 the minority has been particularly unsuccessful in electing its preferred candidate. When considering exogenous elections, those outside of the elections for county council, the minority is much more successful. Extensive statistical data has been presented and debate has arisen over the proper analysis to be undertaken.

8. Additional Factors

The Defendants have presented an array of additional factors which they argue establish that particular minority-preferred candidates lose for some reason other than racial polarization.

***11** First and foremost is partisan politics and party affiliation. *See,* Rosen depo. pp 31, 60, 74, 77-78, 90-91, 94 (Black voters are Democrats. Democrats are out of power. So, therefore, black people suffer the same indignities as white Democrats.); Weber depo. pp 44-45, 53-54, 58, 63, 292 (the African-American nonwhite voters prefer Democrats. The white voters typically prefer Republicans.)

The issue of cause, while treated by the Fourth Circuit as just one of the circumstances rather than incorporated in the *Gingles* test, is Defendants' principal defense. And partisan politics as cause for the electoral disparity in **Charleston County** Council elections is strongly supported by the record, but in a totality of the circumstances analysis, partisanship cannot be the sole determinant.

The ultimate issue is whether "the political processes ... were not equally open to participation by the group in

question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White v. Regester*, 412 U.S. 755, 765-766, 93 S.Ct. 2332, 2339-2340, 37 L.Ed.2d 314 (1973). As in gerrymandering cases, "it is not mere suffering at the polls but discrimination in the polity with which the Constitution is concerned." *Shaw v. Reno*, 509 U.S. 630, 661, 113 S.Ct. 2816, 2835, 125 L.Ed.2d 511 (1993) (White, J., dissenting). " '[T]he question whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality," ' *id.*, at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted), and on a 'functional' view of the political process. *Id.*, at 30, n. 120, U.S.Code Cong. & Admin. News 1982, p. 208." *Gingles*, 478 U.S. at 45, 106 S.Ct. at 2763-64.

The wisdom of not summarily dismissing vote dilution claims based upon partisan politics is discussed in *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 860-861 (5th Cir.1993).

> ... [W]e recognize that even partisan affiliation may serve as a proxy for illegitimate racial considerations. Minority voters, at least those residing in the contested counties in this case, have tended uniformly to support the Democratic Party. At the same time, a majority of white voters in most counties have consistently voted for ... candidates fielded by the Republican Party.
>
> * * *
>
> We fully agree with the Plaintiffs that the bloc voting inquiry, like the "question whether the political processes are 'equally open,' " must rest "upon a searching practical evaluation of the 'past and present reality.' " S.Rep. 417 at 30 (quoting White, 412 U .S. at 769-770, 93 S.Ct. at 2341),

reprinted in 1982 U.S.Code Cong. & Admin.News at 208. Indeed, the refusal of Congress and the Supreme Court to equate losses at the polls with actionable vote dilution where these unfavorable results owe more to party than race may be traced directly to this "functional" view of political life. Plaintiffs are therefore entirely correct in maintaining that courts should not summarily dismiss vote dilution claims in cases where racially divergent voting patterns correspond with partisan affiliation as "political defeats" not cognizable under § 2.

* * *

***12** The suggestion that Republican voters are galvanized by a "white" or "anti-minority" agenda is plausible only to the extent that the Democratic Party can be viewed as a vehicle for advancing distinctively minority interests, which clearly is not the case. At the same time, white Democrats have in recent years experienced the same electoral defeats as minority voters. If we are to hold that these losses at the polls, without more, give rise to a racial vote dilution claim warranting special relief for minority voters, a principle by which we might justify withholding similar relief from white Democrats is not readily apparent. See *Whitcomb,* 403 U.S. at 153, 91 S.Ct. at 1874.
999 F.2d at 860-861

The Defendants also point to the role of the church; the NAACP, education, coalition politics, master levers/buttons, and political successes as contributing to the partisanship within the African-American community.

With all said and done, the issue here is not whether the limited success of African-Americans in electing candidates of their choice to **Charleston County** Council is the result of either polarized racial voting or partisan politics. The issue is

whether the political processes leading to nomination or election to **Charleston County** Council are not equally open to participation by members of the African-American community, a class protected by the Voting Rights Act, in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *See,* § 2. Resolution of that issue requires consideration of all relevant issues including but not limited to those set out in the Senate Report. Here those factors include issues ranging from racial intimidation at the polls, the effects of historical discrimination, economic and social limitations on the African-American community, the results of County Council elections and the effect of partisan politics, among others. The ultimate question of dilution is one of fact, committed to the trial judge who is to decide it based on " 'an intensely local appraisal of the design and impact of the ... multi-member district in the light of past and present reality, political and otherwise." ' *Gingles* at 78, 106 S.Ct. at 2780 (quoting *White v. Regester,* 412 U.S. 755, 769-70, 93 S.Ct. 2332, 2341, 37 L.Ed.2d 314 (1973)).

Consideration of the totality of circumstances is complex and not without genuine issues of material fact. Resolving the totality of circumstances issue here is particularly ill-suited for disposition on summary judgment.

Defendants' Motion for Preliminary Injunction

The Plaintiffs' seek a preliminary injunction, pursuant to 42 U.S .C. § 1973j(d)[4] and Rule 65[5] of the Federal Rules of

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[4] (d) Civil action by Attorney General for preventive relief; injunctive and other relief

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice

Civil Procedure "enjoining **Charleston County**, South Carolina, the **Charleston County** Council, the **Charleston County** Election Commission, the individual Defendants in this action, and their agents and all persons acting in concert with them from seeking to hold or administer elections for open seats on the **Charleston County** Council, unless and

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prohibited by section 1973, 1973a, 1973b, 1973c, 1973e, 1973h, 1973i, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under subchapters I-A to I-C of this chapter to vote and (2) to count such votes.

[5] FN5. (a) PRELIMINARY INJUNCTION.
(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.
(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a pre-luminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

* * *

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER.
Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be re-strained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

until a proper interim or final remedy is implemented under [§ 2] to cure the vote dilution caused by the existing at-large method of election for seats on that body." United States' Motion for Preliminary Injunction.

***13** The requirements for granting preliminary relief are well settled. In *Direx Isreal, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir.1991), the Fourth Circuit Court of Appeals outlined the precise analytical framework which courts must employ in determining whether to grant preliminary relief. First, the party requesting preliminary relief must make a "clear showing" that he will suffer irreparable harm if the court denies his request. *Id.* at 812-13. Second, if the party establishes irreparable harm, "the next step then for the court to take is to balance the likelihood of irreparable harm to the Plaintiff from the failure to grant interim relief against the likelihood of harm to the defendant from the grant of such relief." *Direx Israel*, 952 F.2d at 812. Third, if the balance tips decidedly in favor of the party requesting preliminary relief, "a preliminary injunction will be granted if the Plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation." *Id* . at 813. However, "if the balance does not tip decidedly there must be a strong probability of success on the merits." *Id.* Fourth, the court must evaluate whether the public interest favors granting preliminary relief. The award of preliminary relief is entrusted to the sound discretion of the district court. *Id.* at 811. *Multi-Channel TV Cable Company v. Charlottesville Quality Cable Operating Company*, 22 F.3d 546, 551 (4th Cir.1994).

Here the Plaintiffs assert that they have made a "clear showing" that they will suffer irreparable harm if the court denies this request because Voting Rights Act violations

constitute irreparable harm and indeed violations of constitutional rights constitute irreparable harm for injunctive relief purposes. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). In light of the presence of the three *Gingles* pre-conditions, it is difficult to say that the Plaintiffs have not made the requisite showing of irreparable harm.

The next question is whether the likelihood of irreparable harm to the Plaintiffs from the failure to grant interim relief decisively outweighs the likelihood of harm to the Defendants from the grant of such relief. This is a balancing test, and not, as the United States' suggests by brief, a test of which party should bear the harm. United States' Memorandum pp. 11-12.

Clearly the individual Plaintiffs will suffer no worse harm from the denial of injunctive relief than the individual Defendants will from the granting of the relief. In one case, the individual Plaintiffs may have their votes diluted; in the other case, both the individual Plaintiffs and individual Defendants will have their votes deprived. The United States' interest in preventing the use of discriminatory voting schemes will be irreparably harmed on one hand, and the interest of **Charleston County** and **Charleston County** Council in maintaining the normal election and operation of **Charleston County** Council and **Charleston County** government will be harmed on the other. The named incumbent members of **Charleston County** Council would be required to remain in office for an indefinite and likely extensive period of time, or the County Council would be required to function with a number of members smaller than that necessary to conduct the business of government for an equally indefinite time. Accordingly, the balance may well tip in favor of the Defendants, but at the very least it does not

tip decidedly in favor of the Plaintiffs.

***14** Third, "if the balance does not tip decidedly [in favor of the party seeking injunctive relief] there must be a strong probability of success on the merits." *Direx Israel,* 952 F.2d at 813.

The Plaintiffs here have prevailed on the three *Gingles* pre-conditions and have presented extensive evidence regarding the totality of the circumstances. The Defendants' case hangs largely by the argument that partisanship is the reason for the racial disparity in representation on **Charleston County** Council. To be sure that is not an insubstantial argument, but in a totality of circumstances review, there is a strong probability that it and the Defendants' other evidence may pale when compared to the Plaintiffs' abundance of evidence concerning racial disparity in **Charleston County** and the effects of that disparity on the at-large election scheme. Accordingly, for the purposes of this analysis, it must be said that there appears to be a strong probability of success on the merits of the Plaintiffs' argument.

Finally, the court must evaluate whether the public interest favors granting preliminary relief.

"Intervention by the federal courts in state elections has always been a serious business, not to be lightly engaged in." *Chisom v. Roemer,* 853 F.2d 1186, 1189 (5th Cir.1988). Still a federal court possesses the power to enjoin state elections, and the Voting Rights Act of 1965 clearly authorizes the exercise of such power in appropriate cases. 42 U.S.C. § 1973j(d). Additionally, the public interest aligns with the Congressional enactment of the Voting Rights Act prohibiting the use of an election system that unlawfully dilutes black voting strength. *Johnson v. Halifax County,*

N.C., 549 F.Supp. 161, 167 (E.D.N.C.1984).

Nevertheless, the court's use of its power must be maintained in balance with the power of local government to self-govern. *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir.1988). Because the conduct of elections is so essential to a state's political self-determination, the strong public interest in having elections go forward generally weighs heavily against an injunction that would postpone an upcoming election. *See, Page v. Bartels*, 248 F.3d 175, 194-97 (3d Cir.2001); *Chisom v. Roemer*, 853 F.2d 1186, 1189-90 (5th Cir.1988).

More importantly enjoining the elections would deprive the public of every race the right to vote. "The right to vote freely for the candidate of one's choice is of the essence of a Democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). The right to vote is a "fundamental political right ...preservative of all rights." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 667, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). In fact, even after an adjudication on the merits that a legislative apportionment plan violates the Constitution, the court has been encouraged to exercise restraint in issuing injunctions. *See, Chisom v. Roemer*, 853 F.2d 1186, 1189 (1988).

***15** That is not to say that there are not instances when the court should issue such an injunction. For example, the injunction has issued when a challenge concerned a prerequisite to the election, *Murray v. Kaple*, 66 F.Supp.2d 745 (D.S.C.1999), when the implementation of a change in the method of electing officials was imminent, *Taylor v.*

Haywood County, 544 F.Supp. 1122 (W.D.Tenn.1982), and when a referendum would disqualify certain minority candidates, *United States v. Cicero*, No. 00C 1530 (N.D.Ill. Mar. 14, 2000) (unpublished).

Here the motion has been pending since April 1 and was not filed on the eve of an election. Indeed, the primary is not due to be held for over a month, June 11, 2002, and halting the election at this stage would not be as harmful as if this were the eve of the general election. Further conducting the election under the current at-large system will perpetuate any wrong which may exist.

However, allowing the election to be held would allow the County to continue to function in an orderly fashion with County Council members who have a current interest in governing. It would be consistent with the strong public interest in having elections go forward and not impeding the power of local government to self-govern. It would essentially maintain the status quo pending a resolution of the issues herein. Most importantly it would preserve the right of the public at-large to vote. Under these circumstances, the court would be ill-advised to engage in the serious business of intervening in local elections, and it is difficult to see how the public interest would be served by enjoining the elections.

Conclusion

Now for the reasons stated above, it is recommended:

1. The Plaintiffs' motion for partial summary judgment on the three factors identified in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), be granted;

2. The Defendants' motion for summary judgment as to the

third *Gingles* precondition and the totality of circumstances be denied, and

3. The Plaintiffs' motion for a preliminary injunction enjoining the Defendants from holding future elections for **Charleston County** Council under the existing at-large system be denied.

April 26, 2004.

2004 WL 1149356, 2004 WL 1149356 (D.S.C.)

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JUDGMENT

FILED: April 29, 2004

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

NO. 03-2111
CA-01-155-2-23

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CHARLESTON COUNTY, SOUTH CAROLINA; CHARLESTON COUNTY COUNCIL; JOHN 0. CONLON; TOI AHRENS ESTES; CINDY M. FLOYD; A. D. JORDAN; BARRETT S. LAWRIMORE; TIMOTHY E. SCOTT; LEON E. STAVRXNAKIS; CHARLES WALLACE; CURTIS E. BOSTIC, as members of the Charleston County Council

Defendants - Appellants

and

CHARLESTON COUNTY ELECTION COMMISSION; RUTH C. GLOVER

Defendants

NO. 03-2112
CA-01-562-2-23

LEE H. MOULTRIE; GEORGE FREEMAN; MAGGIE MCGILL; SANDRA FOWLER

Plaintiffs - Appellees

v.

CHARLESTON COUNTY COUNCIL

Defendant - Appellant

Appeal from the United States District Court for the District of South Carolina at Charleston

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

(Before WILKINSON, NIEMEYER, and DUNCAN, Circuit Judges)

Political Development and Change in South Carolina and Charleston County in the Modern Era

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African Americans in South Carolina: From Object to Participant

Historically, South Carolina, like other southern states, had a one party political system which, until the modern era, was composed of politicians who emphasized states rights and segregation. While African Americans and Republicans were dominant political actors during Reconstruction, the role of each became virtually nonexistent by the turn of the twentieth century. Legal restrictions on African American participation in South Carolina politics began to occur in the 1880s. The Constitution of 1895 was designed to eliminate African Americans from the political process through such devices as the literacy test, long residency requirements, the poll tax and disqualification for certain crimes. The white primary system was also used to reinforce this system. As a result, African Americans were no longer participants in but the objects of southern politics. In addition, African Americans were subject to segregation laws which impacted on most aspects of their lives. The disfranchisement practices were upheld by the U.S. Supreme Court in Williams v Mississippi in 1898. The concept of separate-but-equal was declared constitutional by the U.S. Supreme Court by a 7-1 vote in 1896 in Plessy v Ferguson. The lone dissenting judge was Justice Harlan of Kentucky.

The U.S. Supreme Court began to dismantle the system it had legally approved in the nineteenth century in the 1940s. The first device to be declared unconstitutional was the white primary. Like many southern states, South Carolina's Democratic Party excluded African Americans from participation in its primary election. This prevented African Americans from having a meaningful voice in the electoral process since the Republican party was virtually nonexistent. When the U.S. Supreme Court declared the white primary in Texas unconstitutional in 1944 in Smith v Allwright, South

Carolina Governor Olin Johnson called a special session of the General Assembly to recommend repeal of all laws regulating primaries. Within one week it passed 147 bills separating the party's primary from state control.

In 1947 the Negro Citizens Committee sued in federal court for the right to participate in the Democratic primary, claiming the primary controlled the choice of officeholders in South Carolina. Federal District Court Judge J. Waites Waring agreed in Elmore v Rice and in 1948 the Democratic Party began enrolling African Americans. From this beginning comes a change in the politics of South Carolina. The most pragmatic result of the civil rights movement in the low country was the growing political clout of African Americans. From this beginning comes a change in the politics of South Carolina. The most pragmatic result of the civil rights movement in the low country was the growing political clout of African Americans. Within two weeks of the decision a total of 4,727 blacks registered to vote in Charleston County (Brown, 1997, 248). On August 10, 1948, blacks voted in the state's Democratic primary. By fall, 1948 approximately 7,000 blacks were registered in Charleston County. That same year, Arthur Clement, an African American community leader, ran for county council receiving 1,819 votes out of 9,116 cast in the county (1997, 250). In 1950, Arthur Clement ran for Congress against Mendel Rivers. His showing, however, was disappointing in part because many blacks abandoned their candidate and voted for Rivers, a white segregationist (1997, 252).

Black political participation was beginning to get the attention of white politicians. State Senator Oliver T. Wallace was one of the first white politicians to court the black vote openly, addressing the Charleston County Association of Black Churches at Union Baptist Church on October 18, 1949,

(Drago, 1990, 286). Then in 1951 Wallace actively pursued the black vote in his race for mayor as did the incumbent William Morrison. Black politicians endorsed Wallace, however, Wallace lost to the incumbent Morrison by 6,958 to 5,925. The final assessment of the Wallace loss by black leader John McGray was "not enough Negro unity." (1997, 258).

One year later, in 1952, three African Americans, J. Arthur Brown, Herbert U. Fielding and Reverend Frank Veal unsuccessfully ran for seats in the South Carolina General Assembly. An analysis of the election returns show that the candidates received fewer votes in predominately black precincts than Arthur Clement had in 1950 (1997, 258).

In 1956, 29 blacks were elected delegates to the county's Democratic Convention (Drago, 1990, 286). This illustrated the increased involvement of blacks in party politics at the grassroots level. Later in the 1950s, blacks in Charleston County formed two different groups to try and increase their political influence. One group which included Herbert Fielding, John Chisolm, Esau Jenkins and Marjorie Amos Frasier, saw alignment with the more liberal city administration as necessary to develop a base of influence. A second group, called the Committee of 100, led by Fred Moore, Lilliemae Marsh Doster and Reginald Barrett, took the position that the advancement of blacks shouldn't be based on what white politicians deemed acceptable (Brown, 1997, 276).

In 1967, an African American, St. Julian Devine, was elected to Charleston City Council as part of the Gaillard ticket. Then in 1969, Richard E. Fields, a graduate of Avery Institute in Charleston and Howard University Law School, became the first African American in the modern era to be appointed associate judge of the Municipal Court in Charleston. Fields was nominated for the position by a conservative white city

council member William H. Grimball, Jr. Citing the active role of Negroes during the administration of Governor Wade Hampton in the 1870s as a precedent Grimball predicted "we have now reached the stage when we can get back on the road laid down by Hampton. We have reached the point where the color of a man's skin should not make any difference" (Drago 1990, 287). In December of the same year Arthur G. Ravenel, a Republican candidate for governor and former member of the legislature, warned his fellow Republicans that "no Republican can be elected unless he gets some of the Negro Vote. You've got to ask for it...I'm going to do it openly, not sneaking around in alleys" (1990, 287).

In the Democratic Party's 1970 primary, one of the candidates for a state house seat was Herbert Fielding. The Democratic Party's Political Action Committee endorsed Fielding and James Clyburn, two of the three blacks in the field. While Fielding won, he faired poorly in many of the black precincts and had to rely on white support for his victory in an election where at least half the voters were black (O'Neill, 1994, 292). According to Stephen O'Neill this primary "reflected the emergence of a growing political awareness and independence among Charleston's black voters" (1994, 292).

In November, 1970, Herbert Fielding of Charleston County became one of three African Americans elected to the General Assembly, the first blacks to serve in the General Assembly since 1902. Two years later Robert R. Woods, a Charleston minister was elected to the state house along with Ernest A. Finney, a Sumter lawyer (and later Chief Justice of the South Carolina Supreme Court) and Benjamin J. Gordon, a minister from Williamsburg County. Both Fielding and Woods were elected in at-large elections

In 1971 Arthur Ravenel ran for mayor of Charleston as a Republican. Ravenel had a slate of City Council candidates that included five Republicans, eight Democrats, three independents. Four members of his slate were black and three were women. While Ravenel lost to incumbent Foster Gaillard he received the majority of the black vote. For example, in five heavily black precincts on the upper peninsula, Ravenel received 5,169 votes to 2,431 for Gaillard. Following the election John Harper the Chair of the United Citizens Party said, "The wholesale defection of blacks, young and poor from slavishly voting the straight Democratic ticket show South Carolina voters are becoming independent in their thinking" (O'Neill, 1994, 109).

The growing influence of blacks in the political process of Charleston and South Carolina was a result of increases in black registration. In 1958 only 58,000 blacks were registered to vote in South Carolina. Just before passage of the Voting Rights Act in 1965, the percentage of whites in South Carolina of voting age registered to vote was 75.7 percent compared to 37.3 percent of African Americans, a difference of 38.4 percent (Underwood, 1994,249). Approximately two years later, in September, 1967, the U.S. Commission on Civil Rights estimated that 81.7 percent of white citizens were registered compared to 51.2 percent of African Americans (See Table I).

Increased black registration had a significant impact on the role of African American in the state's Democratic party. In 1968, black representation at the state Democratic convention was virtually proportional to the percentage of blacks in the total population and 12 blacks were delegates to the 1968 Democratic convention. South Carolina was the only deep South state that did not have its credentials challenged in 1968 (Edgar, 1998, 541). Then at the 1970 State Democratic Convention about 200 of the 900 delegates were black

including one county party chair and one state committeeman. At that convention the party also selected a black vice chairman for the first time in history and the convention voted down a platform plank calling for a return to the days of freedom of choice on school integration (Bass, 1972, 43-43).

Black voter registration continued to increase rapidly in the next few years. In 1972, black registration was 48 percent while white registration totaled 51.2 percent, a difference of only 3.2 percent. By 1974, the difference was virtually nonexistent. 61.3 percent of whites and 60.8 percent of African Americans were registered. In fact, the commission noted that in Charleston County and Richland County black registration actually exceeded that of whites (Underwood, 1994, 250).

Turnout rates statewide were low for both blacks and whites in 1974: 44.4 percent for whites and 35.5 percent of nonwhite which led James Underwood to conclude that the figures for both races might reveal growing voter lethargy (Underwood, 1994, 250).

Overtime, black political influence translated into increased black representation and a change in attitudes among many white political leaders. In 1968 there were three black members of county governing bodies, two elected law enforcement officers, one city council member and five blacks in other elected positions in South Carolina. (Underwood, 1994, 250). By 1990 there were 322 black elected officials in the state while in 1993 there were 450 (Edgar, 1998, 562). In 2000, African Americans held 687 of the state's 2,774 elective offices including 26 state house seats and seven state senate positions (See Table II).

In 1972, Neal Peirce observed the impact of black voters at the state level and noted that while only four blacks

were in the General Assembly many white members owed their seats to black votes and since the mid 1960s they had been "appropriately sensitive to black demands on such issues as a liberalized registration law, passage of a compulsory school attendance law, a statewide food stamp program, and new bonding authority for a black state college." (Peirce, 1972, 392).

In terms of white politicians, one of the most notable illustrations occurred in the early 1970s. William Jennings Bryan Dorn, who had been a segregationist before the civil rights movement was asked a question about busing for racial balance. Dorn's response was made at a time when schools in Boston were in turmoil over court-ordered busing and President Gerald Ford had expressed his personal opposition to the busing concept. Said Dorn:

> Do you think we're going back to the days when the bus went around and picked up the black children and took them to school and came back and picked up the white children? Those days are gone forever. And to say that we ought to do away with federal funds for busing just to take cities like Boston and Detroit and Denver off the hook when our people in South Carolina are obeying court orders and obeying HEW guidelines—it's wrong! My children ride the bus 10 miles each way to school, and they go to a good consolidated high school, and it's part of a child's education these days to go to school with children of different races and different color and learn it's one small world we live in and that we've got to get along with Chinese and Japanese and people from all countries. My father used to be school

> superintendent in Greenwood, and I remember when he consolidated the schools and it ended classism in Greenwood County, and busing might end another kind of "ism" (Bass and DeVries, 1976, 209-270).

Paralleling the political access was desegregation. In the 1950s, Mayor William Morrison hired black policemen in Charleston for the first time. In 1959 Charleston's Stadium Commission allowed black high schools to use Johnson Hagood Stadium. In 1961, the Municipal Golf Course was integrated. It was the first integrated municipal facility in the state. Demonstrations by civil rights workers in 1963 resulted in desegregation in downtown Charleston. Eighty-seven small businesses promised to provide equal employment opportunities, to desegregate customer services, to use courtesy titles in conversation with black customers and employees and in business correspondence, to serve each customer in turn regardless of race, to allow African American customers to try on articles of clothing, to require the same wearing attire for both black and white sales personnel and to provide equal pay for equal work for all employees (Fraser, Jr., 1989, 417) In 1963, Millicent Brown integrated Rivers High School in Charleston. By 1996, 429 black children were attending formerly white schools alongside nearly 1,800 white students (Drago, 1990, 276).

The 1969 MUSC hospital strike is the culmination of the civil rights movement in Charleston. Hospital workers went on strike over wages. While the strike had limited success, it

Table I
Voter Registration in
South Carolina (Percent Registered)

Year	Black	White	Difference
1966	37.3	75.7	38.4
1967	51.2	81.7	30.5
1972	48.0	51.2	3.2
1974	60.8	61.3	.5

Source: U.S. Commission on Civil Rights, The Voting Rights Act: 10 Years After (1975) cited in James Lowell Underwood The Constitution of South Carolina. Vol. IV, The Struggle for Political Equality, (Columbia: USC Press, 1994), p. 249.

Table II
South Carolina Elected Offices Held By
African Americans

Office	Total	Black	White
State House	124	26	98
State Senate	46	7	39
Mayors	267	34	233
County Council	335	68	267
City Council	1,306	327	979
Sheriffs	46	10	36
School Board	664	214	450

Members			

Source: (Columbia) State. 10 September 2000, p. D5

did impact on black political involvement. In particular a new group of younger, more aggressive leaders moved to the political forefront including Mary Moultre, Bill Saunders and Robert Ford. They not only emerged outside the black establishment, but they also leveled heavy criticism at the old guard and the patronage system it maintained (O'Neill, 1994, 296). They argued that the Democrats took blacks for granted and they were willing to support the party or candidates that would appeal to black voters based on issues rather than going to two or three people who would assure the candidates that they would get the vote (O'Neill, 1994, 300).

Thus by the 1970s, blacks had become participants in the political process of Charleston and South Carolina. Despite the threat to be politically independent, blacks have remained strong supporters of the Democratic Party. Splits do occur especially among older black leaders and younger blacks, on issues. For example, in the 1980s election, Herbert Fielding, Arthur Christopher McKinley Washington and various other black leaders supported a white candidate, Jimmy Bailey, over Robert Ford (Fielding 1990, 228). While Ford is a Democrat, he periodically has supported Republicans in political campaigns. More recently, Tim Scott was elected to Charleston County Council as a Republican. He is the first African American elected to office as a Republican in South Carolina since the early part of the twentieth century. Scott's support has come overwhelming from white voters.

The politics of education has also been an issue which has divided the black community. In 1998, black leadership split over a bond referendum for public schools. While the

bond issue passed it only received 54 percent support from the black community.

Overall, political power in Charleston County in the late 1960s and early 1970s for the most part was a coalition of white leaders and black leaders who formed the majority party, the Democratic Party (Fielding 1990, 60). Democratic candidates elected under this arrangement were supported by black voters. Herbert Fielding, a supporter of single member districts, acknowledged in 1990 that blacks had genuine political power in Charleston County for quite sometime and agreed that the at large election system had elected delegates which were responsive to the black community (Fielding, 1990, 65-69) Politically, blacks have once again become significant actors in the political process.

Political Trends in South Carolina

Until the 1960s South Carolina was basically characterized as a one party Democratic state. During that decade however, the Republican Party began to compete successfully in presidential elections. In addition it began to win a few other races in urban areas of the state.

Jack Bass and Walter DeVries have characterized the growth of the Republican party as a top down development, with the GOP's success starting first with presidential elections and gradually extending down to other elections. Strom Thurmond's explanation for this voting pattern was when South Carolinians vote Republican for president, "They feel that's way out yonder and if they vote Republican there won't be a stigma." But in state elections, especially among the less enlightened people, there's still that stigma against Republicans that goes back to the military rule of 1866 to 1876. (Graham and Moore 1994, 99). Fritz Hollings insists that the Democrats

have maintained their power because they "have been habitually good public servants" and " because they are more conservative than liberal." (1994,100).

This top-down voting pattern can be illustrated by looking at presidential elections in South Carolina. Since 1960, South Carolina has only voted Democratic once in presidential elections. (See Table III). That was in 1976 when Jimmy Carter was the Democratic Party's candidate. Since that time the closest race was in 1996 when Bob Dole received 49.9 percent of the vote to Bill Clinton's 43.9 percent.

Major electoral success for the Republican party for other offices in the state does not occur until the 1980s. The first Republican governor elected in South Carolina since Reconstruction, Jim

Table III
Presidential Voting in South Carolina

Year	Candidate	Percent Of Vote	Votes
1960	Kennedy (D)	51.2	198,129
	Nixon (R)	48.8	188,588
1964	Johnson (D)	41.1	215,723
	Goldwater (R)	58.9	309,048
1968	Humphrey (D)	29.6	197,486
	Nixon (R)	38.1	254,062
	Wallace (AIP), Others	32.3	215,430
1972	McGovern (D)	27.7	186,824
	Nixon (R)	70.8	477,044
	Other	1.5	10,092

1976	Carter (D)	56.2	450,807
	Ford (R)	43.1	346,149
1980	Carter (D)	48.9	417,117
	Reagan (R)	49.4	421,117
	Anderson (Ind)	1.6	13,990
1984	Mondale (D)	36.0	316,746
	Reagan (R)	64.0	561,963
1988	Dukakis (D)	37.6	370,554
	Bush (R)	61.5	606,443
1992	Clinton (D)	39.9	479,514
	Bush (R)	48.0	577,507
	Perot (Ind)	11.5	138,872
1996	Clinton (D)	43.9	504,051
	Dole (R)	49.9	573,458
	Perot (Ind)	5.6	64,386
2000	Gore (D)	40.9	565,561
	Bush (R)	56.9	785,937
	Other	2.3	32,219

Source: South Carolina Elections Commission Reports 1968-2000 Fowler; Presidential Voting (1966).

Edwards, was elected in 1974. His election, however, was the result of a split in the state's Democratic Party. In the Democratic primary, Charles "Pug" Ravenel defeated Congressman Williams Jennings Bryan Dorn. Ravenel, however, was declared ineligible because he had not been a state resident for five years. The state Democratic convention then selected Dorn as Ravenel's replacement. Ravenel refused to publicly endorse Dorn but said he would write Dorn's name

in on the ballot in the November election. Polls had shown Ravenel with a sizable lead over Edwards, but the Democratic split led to a Republican victory.

In 1978, Republican gubernatorial candidate Ed Young observed that all he needed was 20 percent of the black vote to win along with his white base. He tried a different tactic, going all-out to win African American votes. But he only received 37.8 percent of the vote against Dick Riley. Carroll Campbell candidly explained the lesson in a 1979 interview. He stated that Young's effort to win black votes backlashed on him and that it turned off all the conservative George Wallace voters in the state. In Campbell's analysis, efforts to win black voters in South Carolina should be limited to winning middle class black voters who are less concerned with government programs and more supportive of middle class values like the free enterprise system. Campbell made this formula work in his own gubernatorial campaigns in 1986 and 1990.

In 1986, the Republican ticket consisted of two congressmen, Campbell from Greenville and Tommy Hartnett from Charleston. In addition to being successful politicians in their respective congressional districts, they brought to the ticket a regional balance of the low country and piedmont. The result was a Republican gubernatorial victory and the arrival of the Republican Party as a political force at the state level. Beginning with 1986 the Republican Party, has won three of the four gubernatorial elections. (See Table IV). In 1990 Campbell faced state Senator Theo Mitchell of Greenville. Mitchell was the first African American nominated by the Democratic party. In that campaign Campbell won the endorsements of the Black Mayors and the leadership of the predominately black African Methodist Episcopal Church (News and Courier 1990, 3B). Johnny Smith, a black Minister

who was Vice Chair of the state Republican Party, said the task was daunting since blacks overall believed Republicans didn't have their interests at heart. Campbell did run ads on black-oriented stations and supported laws banning discrimination in public places. Theo Mitchell decried the black supporters of Campbell as "Uncle Toms" (1990, 3B). In the general election, Campbell easily defeated Mitchell. Campbell won over 70 percent of the vote and carried forty-three counties. Campbell also carried seven of the state's ten majority African-American counties and won an estimated 14 percent of the African American vote. His reelection, however, was seen more as a personal victory than a realignment of the state's voters. For example, in the lieutenant governor's race, Democratic incumbent Nick Theodore easily defeated Republican Challenger Henry McMaster by carrying forty-three counties and receiving 58 percent of the vote.

Republican gubernatorial candidate David Beasley attempted to gain some African American support in his 1994 campaign when he hired African American political organizer Wilma Neal to help identify and activate African Americans who might be inclined to support him. Neal had worked in the primary for Democratic Charleston Mayor Joe Riley. While the effort did not win a significant number of African American votes for Beasley, Theodore's reaction angered African Americans who would normally be enthusiastic about his campaign. Theodore's camp dug up a 20 year old criminal charge against Neal and leaked it to the press. Beasley indignantly demanded an apology for attempted character assassination (State, 1994, A10).

Beasley narrowly won the governorship in 1994; however, Neal soon broke with Beasley. She resigned from her advisory position within a year charging she had no real access

to Beasley and that his administration was not really sensitive to the problems of African Americans.

In 1998, the Democratic Party regained the governor's office for the first time in 12 years when Jim Hodges defeated David Beasley. The key to Hodges' victory was a combination of a large African American vote, moderates who voted Democratic and disaffected Republicans. African Americans constituted 24 percent of the voters in the election. The Democrats also received 39 percent of the white vote which was seven to eight percentage points higher than average in recent

Table IV
Contested Gubernatorial Elections in South Carolina, 1970-2000

Year	Candidate (Party)	% of Vote	No. of Votes
1970	John West (D)	51.7	250,551
	Albert Watson (R)	45.6	221,233
1974	Bryan Dorn (D)	47.6	248,938
	James Edwards (R)	50.9	266,109
1978	Richard Riley (D)	61.9	384,898
	Edward Young (R)	37.8	236,946
1982	Richard Riley (D)	70.0	466,347
	William Workmam (R)	30.0	201,002
1986	Mike Daniel (D)	48.4	361,328
	Carroll Campbell (R)	51.6	384,565
1990	Theo Mitchell (D)	28.7	211,200

	Carroll Campbell (R)	71.3	524,166
1994	Nick Theodore (D)	48	446,289
	David Beasley (R)	50.4	469,289
1998	Jim Hodges (D)	54	570,070
	David Beasley (R)	45.8	484,088

Source: South Carolina Election Commission Reports, 1970-2000, Graham and Moore, South Carolina Politics and Government (1994).

years. In fact, it was estimated that 20 percent of Republicans voted for Hodges. The election did show, however, that the state had a competitive two party system and that state politics had not become one party Republican.

Republican legislative success also began to develop in the 1980s (See Table V). In 1961, the Republican party won its first legislative seat since the early part of the twentieth century. In 1970, Republicans held 8.9 percent (11) of the state house seats but no senate seats. In 1981, Republican representation had increased to 13.7 percent (17) in the house while the senate had five Republicans our of 46 members. In 1991, there were 42 Republicans in the state house and 12 in the state senate. The urban nature of the Republicans support is illustrated by Table VI..

Major changes in party composition in the legislature occurred because of redistricting. When the General Assembly drew up new house districts, a coalition of 18 African American Democrats and 52 white Republican House members devised a plan. This plan included nine new majority black districts. All of the new majority black districts were created from white Democratic districts. It passed by a vote of 88-22

after white Democrats dropped their opposition (Graham and Moore, 1995).

Leaders of both parties recognized the potential impact this plan would have on party control of the House. Democratic Speaker of the House Bob Sheheen said that the overall changes could hasten the day when Republicans would gain a numerical superiority in the House, giving them control of that body. House Minority Leader Howell Clyborne (R-Taylors) said "the changes are going to help us tremendously, as it will help minority representation." (Moore and Graham, 1995, 10). Katherine Butler, a University of South Carolina law professor who specializes in voting rights, accurately assessed the impact of the redistricting. Butler estimated that "for every black Democrat you produce, you usually produce two white Republicans" (Ibid.).

Table V
Membership in the South Carolina General Assembly by Party

		House		
Party	**1971**	**1981**	**1991**	**2001**
Democrat	113	107	82	53
Republican	11	17	42	71
		Senate		
Democrat	46	41	34	22
Republican	0	5	12	24

Source: South Carolina Legislative Manuals

Table VI
Distribution by Type of District by Party
After 1994
House Elections in South Carolina

		Type		
Party	**Urban**	**Part-Urban**	**Non-Urban**	**Total**
Republican	50	7	6	63
Democratic	17	13	27	57
Independent	2	0	2	4
Total	69	20	35	124

Definitions: Urban = MSA County
Part-Urban = Part MSA County
Non-Urban = Non-MSA County

Source: District Data from Research and Statistical Services Division, State Budget and Control Board

House election results in 1994 illustrate the relative accuracy of Butler's assessment and the continuing transformation of the partisan composition of the South Carolina legislature. (See Table VII). When the election results were in, Democrats maintained a narrow edge of 61 to 60 with three independents. The independents were all former Democrats. No incumbent Republican was defeated while six incumbent Democrats lost. Of the 22 new members, six were African-American Democrats and 18 were Republicans. Soon, thereafter, some white Democrats switched to the Republican Party. When the House members met to choose leadership positions, there were 63 Republicans, 57 Democrats and four independents. South Carolina had its first Republican majority in the House since Reconstruction.

The concentrating of African American voters in districts, resulted in a reduction of African American voters in seats which frequently had been represented by white Democrats. As Table VII shows, the open seats won by Republicans had at most 26 percent minority voting. In the seats lost by incumbent Democrats only one had an African American population of 30 percent. In effect, the diluting of African American voters in districts resulted in more conservative white Republicans winning office

When the General Assembly convened in January, 1995, David Wilkins became the first Republican Speaker since Reconstruction. The Republican influence over the House became obvious following Wilkins committee appointments. The two most important House committees, Ways and Means and Judiciary, were controlled by Republicans. Only two of the six major committees had a Democratic Chair. These were Education and Public Works (EPW) and Medical, Municipal, Public and Military Affairs (MMPMA). Democrat Ronald Townsend (Anderson-Abbeville) was selected as chair of the EPW Committee despite its Republican majority.

Table VII
South Carolina House: 1994 Election Results

Uncontested:	35	Seats
Contested	30	Seats

Contested House Seats Won By Republicans

Open Seats

District	Type	Percent Africa-Amer Population	Republican Percentage	Democratic Percentage
1	Non-urban	4	64	36
2	Non-urban	14	60	40
20	Urban	7	76	24
28	Urban	10	65	35
79	Part Urban	16	72	28
110	Urban	26	59	41
113	Urban	21	64	36
115	Urban	22	62	38
117	Urban	17	73	27

Support for Republican Challengers Who Won

26	Urban	10	54	46
27	Urban	11	61	39
42	Non-urban	30	51	49
63	Urban	13	56	44
67	Non-urban	28	54	46
81	Urban	17	54	46

Support for Incumbent Republican With Opposition

3	Urban	10	56	44
4	Urban	5	78	22
17	Urban	6	67	33
22	Urban	6	71	29
46	Urban	10	75	25
75	Urban	17	91	9
84	Urban	21	83	17
96	Non-urban	26	87	13
100	Urban	23	61	39

107	Urban	8	57	43

Definition of Urban: Largely within a Metropolitan statistical area.
Source: Demographic Data, Research and Statistical Services Division, South Carolina Budget and Control Board.

Representative Joe Brown (D-Richland) was elected chair of the MMPMA Committee by its Democrat majority. Brown was the first African-American to chair a House committee in the 20th century. This was the one House committee that Speaker Wilkins packed with Democrats. An outcry soon arose that the packed committee was given little actual power, because the Speaker referred major legislation dealing with welfare reform to the Republican-controlled Judiciary Committee.

Of the five minor committees, Republicans chair four. The only committee headed by a Democrat was, in part, a result of Wilkins rewarding longtime Democrats who had supported him

Some African American leaders felt having increased representation was important enough to sacrifice white Democratic seats. In a 1996 newspaper interview, Representative Gilda Cobb-Hunter sarcastically took issue with those who wanted to protect the seats of white Democrats: "Spare me from all the good intentions of all these people who are just so concerned about the representation of people of color. I just don't understand why we're in the shape we're in when we've had all these people looking after us all these years (State, 1996, A1).

On the other side of the questions are not only self-interested Democrats, but also many people—including some

of both races—who see negative impacts. Drawing districts—whether they be school districts, city or county council districts, legislative districts, or U.S. House districts—with a first priority of maximizing the number of majority minority districts resegregates communities, causes representatives to see issues mainly in terms of black and white, divides communities into multiple districts so that they lose a clear single voice devoted to them and has a general negative impact on race relations. They argue that creating majority African American districts tends to pack districts with African American voters to the point that representatives from neighboring nearly all-white districts pay little attention to the needs of blacks (State, 1995, A1). (Last paragraph on page 19 of original report beginning with "On the other side of the questions...." deleted.)

Ironically, the historical parallel for this goes back to 1882 when white Democrats packed a fourth of the African Americans in the state into a single congressional district, the seventh district, known then as the "black district." The idea was to minimize the political impact of those blacks who were still voting in the six other districts so that whites could be elected. The practice continued until the 1890s (State, 1991, A12).

The racial gerrymandering of these districts was challenged and based on subsequent Court decisions, the South Carolina General Assembly was required to redraw eight senate and 22 house districts. Special elections for these redrawn districts were held in 1997. Despite new elections, Republican control of the state house continued for the rest of the 1990s. Following the 2000 elections, the Republican party held 71 seats of the state house seats and, after a Democrat switched parties, a 24 to 22 margin in the state senate. As a result South

Carolina became the first deep South state to have both houses of the state legislature controlled by the Republican party.

Redistricting following the 2000 census has resulted in continued controversy. In summer, 2001, South Carolina Democratic Governor Jim Hodges vetoed the redistricting plan passed by the Republican controlled General Assembly, citing the need for more "minority-influence" districts. Democrats, including Hodges said the creation of too many "super-majority white districts had reduced the influence of African Americans in the General Assembly and that white legislators elected from overwhelmingly white districts don't have to concern themselves with African American issues in order to be reelected. (State, 2001, B1). Black leaders also noted the need for minority influence districts. Representative Joe Neal, Chair of the Legislative Black Caucus, said legislators from super-white districts did not listen to black concerns during the flag debate because they knew they would suffer no consequences on Election Day (Ibid.).

Another way of illustrating the growth of the Republican Party is to compare the number of voters in each party's primary. The South Carolina primary system is a semi-closed primary. Voters do not register by party. At the polls on election day they must state in which party's primary they want to vote. Party primary participation is one measure of relative strength of party and both major parties in South Carolina now utilize them to select candidates. The Republican party used the primary for the first time in 1974 to choose its candidate for governor. In that primary Charleston dental surgeon James Edwards faced retired army general William Westmoreland. Only 34,949 people voted in the primary, approximately 10 percent of the number which voted in the Democratic Primary (319,100). While Westmoreland won 35 of the state's 46 counties, Edwards received 58 percent of the vote. In 17

counties fewer than 1,000 persons voted. Two thirds of the vote was cast in five urban counties—Charleston, Lexington, Richland, Greenville and Spartanburg. Approximately 25 percent of the total votes were cast in Charleston County where Edwards received 8,152 votes to Westmoreland's 688. In more recent years, the statewide primary elections have been characterized by a significant increase in participation in the Republican Party and a corresponding decrease in Democratic Party. In 1984, participation in the Democratic primary was over seven times higher than that of the Republican Party. In 1994, the difference was only 11,432 voters and since 1994, more voters participated in the state Republican Party primary. (See Table VIII). (Paragraph on page 21 beginning "In the 1980s participation in the Democratic primary...." deleted.)

The growth in the Republican primary is a result of whites shifting parties. In 1984, 83.5 percent of white voters voted in the Democratic primary. This figure steadily declined throughout the 1980s and, since 1994, the percentage of whites voting in the Democratic party primary has ranged from 37.4 percent to 30.3 percent. (See Table IX).

Table VIII
Number of Voters: Party Primaries, 1984-2000

Year	Democrat	Republican
1984	373,258	48,494
1986	359,577	59,027
1988	334,615	76,739
1990	219,755	103,540
1992(A)		182,257
1994	314,341	302,909
1996	206,354	230,414
1998	149,257	176,406

2000	194,796	197,923

Source: South Carolina Election Commission
(A) SCEC data is incorrect for the Democratic Primary in 1992.

Table IX
South Carolina Primary Participation
(White Only)

Year	Democrat	Republican	Total	Percent Demo
1984	242,260	47,747	290,007	83.5
1986	224,559	58,236	282,795	79.4
1988	218,559	75,364	293,923	74.4
1990	124,727	101,109	225,836	55.2
1992(A)	-	173,438	-	-
1994	177,999	298,390	476,389	37.4
1996	99,224	223,558	322,782	30.7
1998	75,542	173,373	248,915	30.3
2000	101,238	189,435	290,673	34.8

Source: South Carolina Election Commission
(A) SCEC data is incorrect for the Democratic Primary in 1992.

Tables X and XI show the relative percentages by race in the primaries of the two parties. In 1984, 35 percent of the voters in the Democratic primary were non-white. Since 1994, the Democratic primary has had between 48 and 51.9 percent non-white voters. In contrast, the Republican Party primary is virtually all white. Non white participation in the same time period has ranged from 1.3 percent to 4.8 percent of the voters.

Table X
Participation in South Carolina
Democratic Primary
by Race, 1984-2000

Year	Non White	White	Totals	Percent Non White
1984	130,998	249,260	373,258	35.1
1986	135,018	224,559	359,577	37.5
1988	116,056	218,559	334,615	34.7
1990	95,028	124,727	219,755	43.2
1992(A)	-	-	-	-
1994	136,342	177,999	314,341	43.4
1996	107,130	99,224	206,354	51.9
1998	73,715	75,542	149,257	49.4
2000	93,558	101,238	194,796	48.0

Source: South Carolina Election Commission
(A) SCEC data for 992 Primary is inaccurate

Table XI
Participation in South Carolina
Republican Primary
By Race 1984-2000

Year	Non White	White	Totals	Percent Non White
1984	747	47,747	48,494	1.5
1986	791	58,236	59,027	1.3
1988	1,375	75,364	76,739	1.8
1990	2,431	101,109	103,540	2.3
1992	8,819	173,438	182,257	4.8
1994	4,519	298,390	302,909	1.5
1996	6,856	223,558	230,414	2.97

1998	3,033	173,373	176,406	1.7
2000	8,488	189,435	197,923	4.3

Source: South Carolina Election Commission

One final method of illustrating party development is self-perception of party identification. Table XII shows the shift which occurred in party identification in South Carolina during the 1980s. In 1980, 40 percent of whites identified themselves as Democrats while 34 percent said they were Republican. By 1990, only 27 percent of white voters considered themselves Democrats while a majority (51 percent) considered themselves Republican. African American Democratic identification was 84 percent in 1980 and 78 percent in 1990. (See Table XII).

The conservatism of South Carolina whites is one of the major reasons for the party switch. A 1999 Mason-Dixon poll asked the question "I feel the Democratic Party in South Carolina has grown increasingly liberal and no longer represents my views." Among white respondents thirty-five percent strongly agreed and another 23 percent agreed (Graham and Moore, 1994, 72). In contrast most African Americans and some whites still perceived the Republican Party as the party of the rich. The Mason-Dixon poll also included the statement "I feel the Republican Party in South Carolina is controlled by rich country clubbers and the Democratic Party better represents the concerns of working people." Eighty-one percent of African Americans and 38 percent of white respondents agreed (1994,73).

Overall, the Republican Party in South Carolina has experienced tremendous growth over the last 20 years. In a 1995 survey of county party chairs the question was asked if they believed the state was becoming increasingly Republican. Every Republican chair replied yes while 84 percent of the

Democrats said yes. Republicans (83 percent) were optimistic that they would be able to attract black South Carolinians into the party, but most Democrats (80 percent) said this would never happen. Few chairs felt the state would become one party Republican; instead most predicted continued Republican gains at all levels (Edgar, 1998, 561).

Table XII
Partisan Self-Perception, 1980, 1985, 1990
Partisan Identification (in %)

		Democrat	Republican	Neither
1990: In terms of South Carolina state politics, do you consider yourself a Democrat or Republican?	All	41	40	19
	White	27	51	22
	African American	78	10	12
1985: Five years ago, did you consider yourself a Democrat or Republican?	All	46	33	21
	White	34	42	24
	African American	80	10	10
1980: Ten years ago, did you consider yourself a	All	52	27	21
	White	40	34	26
	African American	84	7	9

Democrat or Republican?				

Source: Mason-Dixon Opinion Research, Inc., *Charleston News and Courier*, October 30, 1990.

Political Trends in Charleston County

The development of the Republican Party in South Carolina occurred earlier in the urban counties of the state. Charleston County was one of the first counties where the Republican Party gained a political foothold with the election of Republicans to legislative seats in the 1970s. This Republican support did not extend down to county council for another 10 years. (See Table XIII).

The Democratic Party's success was the result of a coalition of white political leaders and blacks working together to elect people to office who could respond to the political interests of the black community, which according to Herbert Fielding, "worked pretty well," (Fielding 1990, 55). In 1970 Fielding was elected to the General Assembly in an at large election and Lonnie Hamilton, III was elected to Charleston County Council. Hamilton, became the first African American elected to Charleston County Council in its 21 year history. He was elected to the North Charleston seat. In addition to Hamilton, four incumbent Democrats were elected. On the Sunday before the Tuesday election, an ad appeared in the Charleston paper sponsored by the County Democratic Party with the names and pictures of all five council candidates.

Table XIII
Charleston County Council
Members: By Party

Year	Democrat	Republican
1971	9	0
1973	9	0
1975	9	0
1977	9	0
1979	9	0
1981	5	4
1983	5	4
1985	6	3
1987	6	3
1989	6	3
1991(A)	4	5
1993	2	7
1995	0	9
1997	0	9
1999	2	7
2001	2	

(A) One Democrat, Dr. Charles Wallace, switched to the Republican Party between his 1986 and 1990 elections.

In 1972 and 1974, Democrats again swept all the seats for Charleston County Council. In the 1974 election, Marjorie Amos became the first female and second African American elected to county council. She was elected to one of the City of Charleston seats. Lonnie Hamilton, III was reelected to the North area seat of Council and received the second highest vote total of the 10 candidates. Republicans had been hopeful of winning seats since Charleston County resident Jim Edwards was the Republican candidate for governor. While Edwards won 65 percent of the votes in Charleston County his coattails didn't extend to the council races. This illustrated the top down

voting pattern that characterized the state. Arthur Ravenel, Jr., told local Republicans"we can build from the top down" (News and Courier, 1974, 2A). (Paragraph on bottom of page 26 beginning "In 1972 and 1974, Democrats once again swept all seats for County Council....." deleted.)

Democrats also swept the 1976 elections. Of note is that, beginning in 1976, the Chair of the Council was determined by preferential ballot of the electors. Of the five names on the ballot, Lonnie Hamilton, III received the largest number of votes (7,616). Jimmy Stuckey was second (7,510 votes), George Dust was third (7,399 votes), Marjorie Amos was fourth (6,049 votes) and Eddie Buck was fifth (5,506 votes).

On November 8, 1978, the News and Courier began its story on the county council election by stating "Democrats kept their stronghold on Charleston County Council Tuesday as they swept all five councils seats" (News and Courier 1978, 1A). In that election Dr. Charles T. Wallace, son of O. T. Wallace, longtime Chair of the local Democratic Party, led the voting. He received 31,206 votes for the East Cooper seat. Lonnie Hamilton had the second highest vote total (31,005) while Marjorie Amos had the third highest vote total (28,604) in her reelection effort for the City of Charleston seat. Also elected to a City of Charleston seat was Franklin Robson, III with 28,235 votes. Democrat William Kennedy was elected to the West Ashley seat receiving 27,105 votes. Out of the nine candidates for the five seats, the African American Democrats received the second and third highest vote totals. Said Charles Wallace, "I think Robson, Kennedy and I were fortunate to run with two good experienced candidates, Lonnie Hamilton and Marjorie Amos. We made a good team and plugged each other when we could" (1978, 1A). Amos resigned her position on county council two years later after she was appointed to a position on the state's Public Service Commission.

The year 1980 marked the turning point for Charleston County Council. Riding on the coat tails of Republican presidential candidate Ronald Reagan, the Republican council candidates won all four seats in the November election, defeating two newcomers and two incumbents. As a result, the Council had a five to four Democratic majority. Throughout the 1980s the Republican Party would hold three to four seats on county council. In the vote for Chair of Council, Charles Wallace won with 18,344 votes. Lonnie Hamilton III received 17,754 while Kennedy and Roberson received less than 6,500 votes each.

In the 1982 elections, Democrats made somewhat of a comeback as they won four of the five contested seats. Incumbent Democrat Charles Wallace (34,193) and Lonnie Hamilton (33,087) led in the voting. Democrat Robert Clement (31,921) William Kennedy(31,367) and Republican Burnett Maybank (27,482) were the other winners.

In the 1984 elections the two parties each won two seats with the two Democrats winning the open seats for the City of Charleston and West Ashley while the incumbent Republicans were reelected to the two North area seats.

In 1986, Democrats won four of the five seats up for election. The highest vote total for the nine candidates was Lonnie Hamilton, III's 33,049. Dr. Charles Wallace had the second highest figure with 30,778 votes.

In 1988 the parties split the four contested seats. Democrat incumbent Linda Lombard ran unopposed for the City of Charleston seat and Betsy Kerrison easily won the West Ashley race. Republicans Keith Summey and Dr. Charles Wannamaker won the North area seats. This election reflected a significant degree of ticket splitting by the voters.

In 1990, the Democratic Party won two council races while the Republican Party successfully contested three. Lonne Hampton III won reelection to the North area seat. Dr. Charles Wallace, who had switched to the Republican Party, was reelected to his East Cooper seat. As a result, the Republican Party had a majority of council seats for the first time.

The growing strength of the Republican Party was evident in 1992 when four incumbent Republicans won all the contested seats. Two Democrats, both African American, lost by 5,000 to 6,000 votes for the West Ashley seat and the City of Charleston seat.

In 1994 the Republican Party won five contested seats for county council. The most significant result was the defeat of Lonnie Hamilton III, who was seeking his seventh term. While Hamilton received over 4,000 votes more than any of the other three Democratic candidates, he narrowly lost to newcomer John Conlan for the North area seat by a count of 34,144 to 32,966. Republican Party County Chair Mark Hartley stated after the election "I think it's clear Charleston County has become a Republican County" while newly elected Republican council member Tom Masi stated "There's a wave of conservatism rolling across the country and even Democratically controlled Charleston has been taken in by the wave" (News and Courier, 1994, 1A). Hamilton, who was characterized by the paper as not taking his challenger seriously enough to campaign diligently enough said a friend had recently told him, "You've got to work hard because you can take a roach and put a name on the roach and call him a Republican and get that Republican elected. We laughed about it, but evidently what he said was true" (1994, 1A).

Two special elections for county council seats took place in February, 1995 and February 1996, In the 1995 election Tim

Scott, an African American Republican was elected over Floyd Craven, a white Democrat for the North area seat by a 6,471 to 1,633 total. This seat had been held by Keith Summey who had resigned his council position to run for Mayor of North Charleston. With his victory, Tim Scott became the first African American Republican elected to public office in South Carolina since the beginning of the twentieth century. One year later, Republican Ruth Glover defeated African American Democrat Virginia Morgan 5,533 to 4,640 for the seat left vacant when council member Vaughn Howard died.

The Republican victories of 1994 were repeated in 1996 when the Republican Party easily won all four contested seats by wide margins reinforcing the perception of Republican Party domination of Charleston County.

In April 1997, Charleston County had another special election to fill a vacant North area seat following the death of Dr. C. C. Wannamaker. African American Republican Tim Scott, who had unsuccessfully challenged Democrat Robert Ford for a state senate seat, was reelected to county council. He defeated African American Democrat Stephanie Ganaway 5,254 to 2,637. Libertarian Party candidate Rodney Travis received 438 votes.

In 1998, the Democratic Party staged a comeback and captured two of the four seats they challenged in the election. Democrat Andy Floyd unseated Republican incumbent Mike Smith and Democrat Leon Stavrinakis won one of the two City of Charleston seats. Democrat Pearl McCoy an African American lost the second City of Charleston seat to Republican Toi Estes by 2,000 voters while Democrat George Freeman, an African American, lost the East Cooper seat to 20 year veteran Dr. Charles Wallace by less than 2,000 votes. Defeated Republican council member Tom Masi attributed the defeat to

the failure of the Republicans to recognize the strength of the Democrats. Said Masi, "In 1994 the Republican Party energized and surprised the Democratic Party. In 1998, the Democratic Party was energized, they got their people to vote, and they surprised the Republican Party" (Post and Courier, 1998 A1). Mike Smith attributed the loss to the poor showing of Republicans statewide. Said Smith, "The governor was pulling us down. How do local candidates overcome a 20,000 vote deficit that Beasley and Inglis lost by?" (Ibid.).

Republicans did make a comeback in 2000 winning the four contested seats. Of note was the successful reelection of Tim Scott, to one of the two North seats. In 2001, the Republican Party has seven of the nine county council positions. While the Republican Party has become dominant, the Democratic Party still has the ability to compete successfully countywide with competitive candidates and voter turnout. Table XIV shows the percentage of nonwhite registered voters in Charleston County. From 1984 to 2000, with the exception of 1994, nonwhites were at least 30 percent of the registered voters. The turnout of nonwhite voters has consistently been below their white counterparts. (See Table XV). In examining the decade of the 1990s, nonwhite participation drops to 25.3 percent of the total in 1994, the year the Republican Party sweeps the local races. The numbers and percentage of nonwhite voters increases after 1994. In 1998, when Democrats won two county council seats the percentage of nonwhite voters reached its highest figure (30.9 percent) since 1986. Then in 2000, nonwhite participation dropped to 27.8 percent of the voters.

In Charleston County Republican Party parity in the primary election occurred in 1988. (See Table XVI). Since then participation in the Republican primary has increased to

the point where, in 2000, Republican voters outnumbered Democratic voters by approximately three to one.

Another factor which explains the shifting of county council to the Republican Party is a change in partisanship on the part of white voters in the county. Council member Dr. Charles Wallace, who switched from the Democratic to the Republican party in the 1980s, reflects the sentiment of conservative Democrats at that time. He said the National Democratic Party had

Table XIV
Charleston County
Voter Registration
By Race 1984-2000

	White		Non-White	
Year	**Number Registered**	**Percent of Registered Voters**	**Number Registered**	**Percent of Registered Vote**
1984	86,506	67.0	42,526	33.0
1986	77,712	66.1	39,786	33.9
1988	86,768	67.8	41,255	32.2
1990	78,329	68.0	36,889	32.0
1992	93,384	69.6	40,768	30.4
1994	88,882	70.4	37,306	29.6
1996	103,137	68.2	47,997	31.8
1998	110,305	68.2	51,435	31.8
2000	122,557	69.1	54,722	30.9

Source: South Carolina Election Commission

Table XV
Charleston County
Voter Turnout By Race 1984-2000

	White		Non-White	
Year	**Number Voted**	**Percent of Voters**	**Number Voted**	**Percent of Voter**
1984	64,130	69.0	28,795	31.0
1986	42, 901	68.9	19,394	31.1
1988	62,638	71.0	25,530	29.0
1990	46,488	71.5	18,536	28.5
1992	73,716	71.7	29,044	28.3
1994	57,253	74.7	19,422	25.3
1996	70,195	70.6	29,162	29.4
1998	61,136	69.1	27,311	30.9
2000	82,395	72.2	31,771	27.8

Source: South Carolina Election Commission

become very liberal and he realized he was more comfortable as a Republican (Wallace,2001). Herbert Fielding also recognized this in 1990 when he noted that blacks were "still fairly solid for the Democratic Party," but "it is the shrinking in the white faction" that was jeopardizing the coalition that made the Democratic party the majority party in Charleston County (Fielding, 1990, 65).

Table XVI
Number of Voters
Charleston County Party Primary,
1984-2000

Year	Democrat	Republican
1984	14,777	7,242
1986	18,958	8,499

1988	4,340	4,395
1990	10,040	10,503
1992(A)	-	20,840
1994	27,489	33,562
1996	8,081	21,778
1998	4,969	13,747
2000	8,275	25,423

Source: South Carolina Election Commission
(A) Democratic Data is incorrect

This change is illustrated by Table XVII which shows white participation in primary elections in Charleston County from 1984 to 2000.

In fact, if one looks at participation in each party's primary by race, it becomes evident that non-white voters have dominated the selection of Democratic party candidates since the mid 1980s, constituting between 54.6 percent and 92.2 percent of the voters. (See Table XVIII). While many whites have shifted party loyalty, the Charleston County African American community is like African American voters throughout South Carolina, strongly Democratic. In Charleston County since 1984 the percentage of non-white voters voting in the Republic primary varies from one percent to 6.2 percent of the total. (See Table XIX).

XVII
Charleston County Primary Participation (White Only)

Year	Democrat	Republican	Totals	Percent Demo
1984	5,018	7,161	12,179	41.2
1986	6,571	8,413	14,984	43.9
1988	1,835	4,259	6,094	30.1

1990	3,321	10,302	13,623	24.4
1992(A)	-	20,431	-	-
1994	12,474	33,035	45,509	27.4
1996	1,003	20,431	21,434	4.7
1998	1,726	13,511	15,237	11.3
2000	643	24,013	24,656	2.6

Source: South Carolina Election Commission
(A) Democratic Data is incorrect.

Another method of examining partisan voting in Charleston County Council elections is to look at votes cast for Dr. Charles Wallace in 1986 and in 1990. Between those two elections Wallace switched from the Democrat to the Republican. Wallace noted when he first ran for Council, the Democratic Party was the majority party in Charleston County. In his campaign he contacted various leaders especially in the black community and asked for their advice. Also, the group of Democratic candidates ran as a team and he and all the Democratic candidates were elected. (Wallace, 2000).

Table XVIII
Participation in Charleston County Democratic Primary by Race

Year	Non-White	White	Totals	Percent Non-White
1984	9,759	5,018	14,777	66.0
1986	12,387	6,571	18,958	65.3
1988	2,505	1,835	4,340	57.7
1990	6,719	3,321	10,040	66.9
1992(A)	-	-	-	-
1994	15,015	12,474	27,489	54.6
1996	7,078	1,003	8,081	87.6
1998	3,243	1,726	4,969	65.3

2000	7,632	643	8,275	92.2

Source: South Carolina Election Commission
(A) SCEC data for 1992 is inaccurate

Table XIX
Participation in Charleston County Republican Primary by Race

Year	Non-White	White	Totals	Percent Non-White
1984	81	7,161	7,242	1.1
1986	86	8,413	8,499	1.0
1988	136	4,259	4,395	3.0
1990	201	10,302	10,503	1.9
1992	409	20,431	20,840	2.0
1994	526	33,036	33,562	1.6
1996	1,347	20,431	21,778	6.2
1998	236	13,511	13,747	1.7
2000	1,410	24,013	25,423	5.5

Source: South Carolina Election Commission

Wallace notes that somewhere between 1980 and 1990 the Democratic core got smaller and the Republican core got larger and sometime during the decade it flipped and the Republican Party became the more dominant party.

Election results for county council races reflect this change. The Wallace vote by precinct also vividly illustrates how party affiliation enters into voting decisions in Charleston County.

If one examines the votes for Dr. Charles Wallace in 1986 and 1990, the role that party affiliation plays in voting is obvious. (See Table XX). The five downtown Charleston

precincts are predominately black. Charles Wallace the Democrat received from 89.5 percent to 99.2 percent of the vote in each. Four years later Charles Wallace the Republican receives from 2.8 percent to 22.1 percent of the vote in these precincts. Conversely, in five predominately white precincts in Mt. Pleasant, an East Cooper community, his vote totals increased by 24 percent to 36 percent to the total. Obviously, party affiliation impacts on voting by both black and white voters but the impact is more pronounced among black voters.

Table XX
Wallace Vote By Party: Select Precincts

	1986			1990		
Precinct	**Total(A) Votes**	**Wallace Votes**	**Percent of Total**	**Total (A) Votes**	**Wallace Vote**	**Percent of Total**
Charleston						
10	772	691	89.5	690	120	17.4
11	719	647	89.9	648	103	22.1
12	261	251	96.2	171	11	6.4
13	364	361	99.2	327	9	2.8
14	414	394	95.2	283	29	10.2
Mt. Pleasant						
3	839	419	50.0	940	747	79.5
4	1,035	521	50.3	1,041	773	74.3
5	298	125	41.9	307	238	77.5
6	770	351	45.5	997	773	77.5
7	1,011	417	41.3	1,283	992	77.3

Source: South Carolina Election Commission (1990)
Charleston County Board of Convassers "Statement and Returns of Votes for General Election (1986)"
(A) Does not include write-in votes.

An examination of partisanship in Charleston County voting patterns over the last two elections for select races also illustrates the role party identification plays. (See Table XXI).

Table XXI
Vote Comparisons: Select Races (A)
Comparison of Votes: Council/President, 2000

County Council #4	**Number of Votes**	**Percent**
Curtis Bostic (R)	54,464	54.03%
Chris Murphy (D)	46,337	45.97%
George Bush (R)	58,229	54.04%
Al Gore (D)	49,520	45.96%

Comparison of Votes: Council/Comptroller General, 1998

County Council #2		
George Freeman (D)	38,211	48.84%
Charles Wallace (R)	40,025	51.16%
County Council #4		
Cindy Floyd (D)	41,048	52.44%
Mike Smith (R)	37,233	47.56%
Comptroller General		
Jim Lander (D)	42,964	53.41%
John Courson (R)	37,474	46.59%

(B) Council races chosen were the only two races with Democrat and Republicans contesting a single seat. City of Charleston had two seats elected in 1998.

(A) Comptroller General race used because there were no incumbents or candidates from the Charleston area.

In 2,000 if one compares the vote totals of the County Council race for District #4 with the vote totals for Bush and Gore, the two percentages are almost identical (54.03 percentage for Republican candidate for council, 54.04 percentage for Republican presidential candidate).

In 1998, the vote totals for Comptroller General and the county council race for District #4 was less than one percent different. In that same year, the figures for Council District #2 varied by less than five percent.

In conclusion, voting patterns in Charleston County reflect those which are characteristic of the South. Republican presidential voting begins as early as the 1950s. Significant Republican support in statewide elections emerges in the 1970s. Republican electoral success at the county level does not occur until the 1980s. Analysis of the voting data show African Americans have generally remained Democrats while a significant number of white voters have moved away from the Democratic Party. While this has resulted in the election of Republicans to most county positions, the Democratic party still has the ability to elect candidates if it turns out its base in elections, as it did in 1998, and minority preferred candidates can be successful running as Democrats.

Conclusion

Historically, racial discrimination in the United States is a fact of life. The South and South Carolina used the legal system from the 1890s until the 1960s to impose a segregated society and to limit African American participation in the South. The South's commitment to segregation and an agrarian

society resulted in widespread poverty and limited education opportunities. A commitment to a "New South" economically, politically and socially has led to an increased standard of living and increased educational opportunities. African Americans suffered disproportionately under the old system and it does impact on their current socioeconomic status in Charleston County, in the state of South Carolina and in the nation as a whole.

An assessment of the political history of South Carolina and Charleston County since the passage of the Voting Rights Act of 1965 includes the following.

First, there has been significant political change in South Carolina over the last 50 years. Legal segregation has ended and African Americans have seen the legal barriers limiting their participation in the political process removed. By 1974, black voter registration in the state was 60.8 percent compared to 61.3 percent of whites while in Charleston County black registration actually exceeded that of whites.

Second, the generation of blacks most directly impacted by segregation registered at a higher rate and participated at a higher rate than their contemporary counterparts in Charleston County. Tables XXII and XXIII illustrate several finds in terms of voting in Charleston County. First, younger voters are less likely to vote. The highest turnout is of voters between the ages of 45 and 64; the lowest is among those between 18 and 21 for both non-white and white. Second, if one looks at the voters in 1984 and compares them with 2000 there is a collective decline in participation of all voters. Third, if one looks at the data for non-white precincts in 1984, non-white voters who grew up in a segregated society had a significantly higher rate of participation than those who didn't. In fact, all age groups of

voters in non-white precincts in 1984 had a higher percentage of registered voters than their counterparts in 2000.

Third, a viable black-white political coalition emerged within the Democratic Party in South Carolina in the 1960s. This is illustrated by African American participation in party activities, changes in the policy position of the dominant Democratic Party, attitudinal changes on the part of

Table XXII
Charleston County Registered Voters and Voting: By Age

1984

Characteristic	18 - 21	22 - 44	45 - 64	65
Registered	9,569	67,801	34,526	17,136
Voted	5,695	45,614	28,384	13,232
Percent	59.5	67.3	82.2	77.2

2000

Registered	7,376	82,651	57,113	30,139
Voted	3,498	45,717	42,799	22,152
Percent	47.4	55.3	74.9	73.5

Source: SC Election Commission

Table XXIII
Charleston County Registered
Voters and Voting: By Age, Select Non-White Precincts
1984

Characteristic	18 - 21	22 - 44	45 - 64	65
Registered	209	849	463	286
Voted	93	487	370	198
Percent	44.5	57.4	79.9	69.2
2000				
Registered	99	1,058	653	549
Voted	36	415	424	331
Percent	36.4	39.2	64.9	60.3

Precincts: Charleston 12 and 13 for 1984 (1,795 nonwhite, 12 white voters) Charleston 21, 24 and 30 for 2000 (2,269 nonwhite; 90 white voters)
Source: SC Election Commission

white Democrats and the election of blacks to public office. This coalition dominated the political landscape of the state and county in the 1960s and 1970s. Statewide Democratic officeholders frequently held their electoral success to black voters. In Charleston County African Americans and minority preference candidates dominated the electoral process throughout the 1970s. During the 1980s minority preference candidates continued to be elected to a majority of the council positions within the at-large system. African Americans were also active in the Democratic Party and one, Bill Saunders, served as party chair.

Fourth, the decline in the dominance of the Democratic Party coincided with the Reagan revolution in the 1980s. By the end of the 1980s, Democratic Party dominance in the state

and Charleston County was ending as conservative Democrats shifted to the Republican Party in increasing numbers. This reflected a southern and state trend. Despite this change the Democratic Party maintained the ability to win at-large elections if its African American base participated. The county council elections in 1998 illustrate this. In that year, two minority preference candidates were elected to county council. This was the first election since 1986 where the non-white percentage of the voted exceeded 30 percent of the voters (30.8).

Fifth, a few African Americans have begun to move away from identification with the Democratic Party. As we have seen, Republican gubernatorial candidates Ed Young, Carroll Campbell and David Beasley all either sought black support or had blacks active in their campaign. The state's Republican Party has had a committee devoted to minority affairs and has had one African American serve as a county party chair in recent years. In addition, African Americans have run for office as Republicans in recent years. Tim Scott's election to Charleston County Council marked the first successful election of a black Republican in South Carolina since the beginning of the twentieth century. His conservatism is not unique among African Americans. In fact, a 1997 poll by the Joint Center for Political and Economic Studies found that black Americans are evenly divided into groups which describe themselves as liberals, moderates and conservatives (Post and Courier, 1998, 10-A). While African Americans continue to be strongly Democratic, there have been differences in the black community over political issues and election strategy. Most recently, black voters in Charleston County split 54 to 46 percent over a school bond issue in March 1998 with a slim majority supporting the vote. One of the leading opponents to the $350 million bond proposal, State Senator Robert Ford, spent $5,000 opposing it.

Sixth, election results in Charleston County reveal that African American voters can attract white support. One example is the electoral success of Tim Scott, a black Republican, who was elected to county council in a special election in 1997 and again in 2000 to one of the North area seats. At present, African Americans also constitute a majority of the members of the Charleston County School Board. School Board members are elected in nonpartisan, at-large elections. Still another recent example is the election of Thomasena Stokes-Marshall, a retired New York police detective, to the Mt. Pleasant Town Council. In September, 1998, she was elected to the Mt. Pleasant Town Council, placing fourth in an at-large election in which all four incumbents were ousted. Mt. Pleasant's population is about nine percent black (News and Courier, September 21, 1998, B1). Stokes-Marshall attributed her success to having done her homework in terms of targeting different groups of voters. She was also involved in numerous community projects, including the children advocate Guardian Ad Litem program, the Center for Women, Meals on Wheels and the Mt. Pleasant comprehensive planning facilities committee. "I need the white vote," said Stokes-Marshall, so she walked through the different communities, knocking on doors and allowed people to meet her. She noted, "I think what impressed the voters and got them to trust me with their votes was my attitude about community service." (Chronicle, 1998).

The strategy utilized by Stokes-Marshall illustrates a growing awareness of the need for a biracial coalition in order for blacks to achieve not only electoral success but also public policy which positively impacts on the black community. Historically, Herbert Fielding attributed much of his electoral success to the development of a broad platform that appealed to blacks and whites and to lower middle and upper income

groups. (Underwood, 1994, 252). In the 1980s, Political Scientist Michael Maggiotto observed "it is clear that, for Democrats to be successful they have to forge an enduring coalition of interests and respect between black and whites" and noted, "that racial polarization spells defeat for Democrats." (Maggiotto, 1988, 149).

The racial polarization which emerged following the redistricting of the General Assembly in the 1990s resulted in diminished legislative influence for African Americans in the General Assembly even though the number of black legislators increased. As Political Scientists Carol and Robert Botsch noted in 1996, if representation is based primarily on race, politics will continue to be mainly based on race. Other political issues that could challenge the rule by conservative white elites will tend to be ignored and the long-standing traditionalistic political system will continue (Botsch and Botsch, 1996, 84).

In terms of a solution to race-based politics South Carolina State University Professor Rickey Hill noted "clearly black people must develop political practices which will attract white voters. Black political candidates must begin to contest for political power in South Carolina's urban centers and statewide" (2000, D5). Hill went on to state that to be successful politically, African Americans must start developing "independent political formations" while remaining active in the two parties. Blacks must "produce a viable and progressive political agenda for public discourse if they hope to have real impact in the 21st century." (Ibid).

Representative Joe Neal (D-Richland) and Chair of the Democratic Black Caucus says the key "is to push for broad coalitions between blacks and whites. The reality is, the issues

we address are the same issues in the white community. They're not black issues" (Ibid.).

Former House Minority Leader Gilda Cobb-Hunter (D-Orangeburg), in her observations on what must be done to get more whites to vote for blacks, stated, "First, we need to stop electing people to office based on race. It's not good enough to be African American. We need to start sending men and women to the table who understand the process, who are going to look out for the whole. Second, we must be committed to building our communities ourselves and not waiting for someone else to do it. Three, we need to have the courage to develop an agenda and pursue it aggressively. We need to, as blacks, get comfortable with the idea of coalition building. There are no permanent friends, no permanent enemies, only permanent issues." (Ibid.).

Veteran political reporter Lee Bandy notes that "experts say that counties which are 30 percent black or greater can be turned into political power bases." (Ibid.). Charleston County has consistently had that percentage. And where studies have shown that approximately 30 percent of white voters in the South vote for African American congressional candidates based on party (Bullock and Dunn, 1999), it is realistic to assume that minority preference candidates have the ability to be elected in an at-large system.

There is not a quick fix to the issue of the role that race plays in the political process. The creation of majority-minority districts may lead to an increased number of minority elected officials; however, it can also result in greater racial polarization where the racial minority in an election district, whether that minority be black or white, perceives its representative as uninterested in its needs. In fact, the elected representative in either instance may be able to ignore the racial

minority in his/her district in a political campaign since its numbers are too small to impact on the outcome. Once elected to a political entity, the racial group that is in a numerical minority may have no real influence in the public policy process. In contrast, non-white voters in Charleston County possess the numbers under the present at-large system to not only elect minority preference candidates, but to impact on the policy process as well since they represent over 30 percent of the constituency of every council member.

In conclusion, law professor James Underwood, in his work, The Constitution of South Carolina: The Struggle for Political Equality, traced the legal struggle for equality of African Americans from Reconstruction to the 1990s. He concluded that there is a need for consensus building in order to govern a diverse land. Said Underwood:

> Consensus building inevitably involves occasional representation by one who is not an educational, racial, ethnic, sexual, or geographical clone of one's self. A system that is permanently geared toward carving out seats that are guaranteed for particular groups poses the question of what groups are entitled to such treatment. Is a lengthy history as a victimized group (excluded from the political process) necessary, or is being merely a substantial part of the population enough? If the latter is sufficient, how large a segment of the population must the group be? Any system that focuses with monocular intensity on a particular characteristic, or a narrow cluster of characteristics, whether they be racial, religious, ethnic, economic, or educational, tends to preordain the outcome of elections, a result that is, if long employed, antithetical to representative democracy.

> Democracy must be flexible enough to emphasize new issues and de-emphasize others that have grown less vital. Designing a representation system that guarantees seats for a particular group based on a single characteristic, or a narrow cluster of traits, such as race (or economic status, party affiliation, social or demographic class), tends to assume that certain issues are dominant and will continue to be dominant. From time to time rural versus urban or urban versus suburban issues may be crucial. At other times, varying economic issues may be most significant. But none of these issues will be forever dominant and none will be frozen in form. Thus their chameleon quality makes them a poor basis upon which to erect a system of apportionment. An equal population approach in which each legislator represents approximately equal numbers of people, without regard to the racial, ethnic, economic, or other characteristics of the population has a better chance of achieving a system that does not tend to preordain election results or freeze into constitutional form certain issues as forever being the important ones. (Underwood, 1994, 376).

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I declare under penalty of perjury that the foregoing is true and correct, reflecting only technical corrections, corrections of tables and columns and corrections of misspellings contained in the original draft submitted in this case.

Executed on this 15th day of February, 2002.

/s/ William Vincent Moore

House, her opponent also used pictures of both candidates,
darkened the picture -- I remember talking to Lucille and she
was upset. She said it made me look ugly, period. But
Lucille won that particular race. So it's been used -- in
some cases you have a person using that having won, in other
cases having lost.
And if I can elaborate slightly more, in -- in the 1970s,
it's interesting because you could see the Republican Party
in the '70s referring to bloc vote, inference being black,
African-American voting in bloc, but moving away from that in
the 1980s, 1990s, which for me infers that race was declining
as an issues in terms of the party using it.
Q Does it also mean, sir, that race was used less overtly
and more subtlely as time went on?
A I would disagree with that and say that there are other
people that move into the party that focus on issue. I
remember Jimmy Stuckey noting, for example, you know, white
southerners who are conservative.
And you see this in the campaigns in Charleston County.
You see the advertisements basically playing that
conservative theme within the Democratic Party and the
Republican Party. And what Jimmy Stuckey said is, You use

23 the word conservative; I'm a conservative. I want to reduce
24 taxes, and I want to reduce the size of Government. And he
25 did add one more thing to the Republican Party, and he said,

1 I'm a Republican.
2 And that represents the common themes being used.
3 But, for example, in you look at the campaign literature
4 of Democrats, there's that same impetus. I'm a fiscal
5 conservative, I'm responsible, so on and so forth.
6 So it was really focusing on the reality of the political
7 ideological orientation of the voters.
8 Q Now, in terms of race being a potential issue in each
9 election, you do agree with that, correct?
10 A Race can be one of many issues. There's no way you can
11 eliminate any issue as potentially being involved in a
12 political campaign.
13 Q Well, your book talks about this issue. And it says
14 that, One of the more commonly used techniques is to use race
15 in photographs.
16 And you just mentioned a couple of examples, correct?
17 A It is the technique which has been used and one that is
18 frequently referred to.
19 Q Okay. And the racial message is obvious to you, correct?
20 A When I've seen it generally, I -- I've seen it as being

used for that purpose, although actually, if you look at the elections in Charleston County for County Council, every election that I've gone back and observed, the Charleston newspaper will print a story prior to the election on the election, list the candidates with pictures of the

A I do.
Q All right. I just want to ask you about these that appear on that list: Do you see under the City of Charleston race, that residency district, the electoral result for Andy Savage, a Democrat who was running in 1986?
A I do.
Q What did your figures show with respect to African-American vote received by Andy Savage, the Democratic candidate in that 1986 race?
A 49%.
THE WITNESS: And, again, this is dual-seat election, Your Honor, so that's pretty close to everybody.
BY MR. GRIFFITH:
Q So without question, again, was Andy Savage a minority-preferred candidate in that race?
A He was.
Q And, again, in the East Cooper residency district, you see where Dr. Charlie Wallace running as a Democrat had a certain vote total?
A (Nods head.)
Q In your own analysis of Dr. Wallace in 1986, did you determine whether or not Dr. Wallace was the minority-preferred candidate?
A He was.
Q What was his approximate total of African-American votes

received?
A 97%.
Q And did you see in the north area seat, where Lonnie Hamilton was running, again, for office?
A Unopposed.
Q Right.
A Right.
Q You have indicated earlier there are special circumstances that basically render an election not helpful or meaningful. Would you agree with me that the fact that Lonnie Hamilton won this election even without being opposed, do you believe that's meaningful data?
A It's meaningful data in the totality of circumstances. It's not meaningful data in determining if blacks are cohesive.
Q But in the totality of circumstances, you determined that Lonnie Hamilton received a certain percentage of votes of African-American voters, and what was that percentage?
A I have no idea. I didn't examine the unopposed races, so I don't have an analysis of that election.
Q Would it be fair for me to suggest that your conclusion would be no different than that of Dr. Wallace, that Lonnie Hamilton was without a doubt a minority-preferred candidate?
A No, I'm not willing to go out on a limb on that one.

25 That might be the case. What happens when there's not an

A Yes.
Q And he won the 1990 race with a person that changed his
party allegiance and winning it with Republican votes,
correct?
A Correct.
Q Now, would you agree with me that he was not the only
County Council candidate whose race you analyzed that
involved a party switch?
A I don't remember another one. You want to refresh my
memory?
Q I'm not trying to trick you.
A No, I'm just saying if you want to bring one to my
memory, I will be glad to look it up.
Q I asked you about Charlie Lybrand, in which Charlie
Lybrand had run for County Council as a Democrat and had been
defeated; do you recall that?
A Yes.
Q Well, in 1990, in the West Ashley residency district,
Charlie Lybrand, not as a Democrat, but as a Republican; do
you see that?
A I do.
Q In the first race in which Charlie Lybrand ran as a
Democrat and lost, November 6th, 1984 --
A Yes.
Q -- did you determine the amount of African-American vote

that Charlie Lybrand received then?
A Yes, in 1984, he received 94% of the black vote.
Q He was, in your opinion, professionally speaking, the minority-preferred candidate in that race, correct?
A He was the minority-preferred candidate in that race.
Q Yet when the same Charlie Lybrand switched his party allegiance from Democrat to Republican in the 1990 race, he achieved electoral success; did he not?
A He did.
Q And from your calculation, what was the percent -- what was the percentage of the African-American vote received by Charlie Lybrand in that 1990 general election?
A 4.
Q He went from 96% of the African-American vote as a Democrat to 4% of the vote, correct?
A That's correct.
Q And you would agree with me, then, that his party affiliation had an outcome-determinative effect upon his electoral success in 1990?
A No --
Q Correct?
A No, I can't conclude that.
I can conclude that his change in party preceded his winning, but that's -- that's post hoc ergo proctor hoc. That is, one changed the other. Not every Republican has

attempt to do it in terms of all extreme cases, by any stretch of the imagination, but, again, just to illustrate an example of how voter sentiment is reflected by party.

Q And I believe you have that tabulation over on Table XX, do you not?

A Correct.

Q First of all, we can all see the numbers and the five different precincts from Charleston: 10, 11, 12, 13, and 14.

And Mt. Pleasant: 3, 4, 5, 6, and 7.

What do these show, Dr. Moore, with regard to the impact or affect of Dr. Wallace's change in his party loyalty?

A In terms of African-American voters, African-American voters, of course, obviously vote Democratic.

In these precincts, for example, Charleston 13, in 1986, Dr. Wallace got 99.2% of the vote. He got 361 votes out of 364 votes. That's a precinct, by the way, where there are three white registered voters. 954 at the time.

You move to the Charleston 13 in 1990. Goes from 99.2% of the vote to 2.8% of the vote.

Q Now, Dr. Moore, let me ask you this: How does that illustrate, if at all, how party affiliation enters in the voting decisions in Charleston County elections?

A It is obvious in terms of the African-American community that African-Americans are voting by party.

Q What other significant outcomes on the precinct level did

you note?
We have a number of them here, but what are the most significant ones that you noted in terms of the effect in an extreme precinct of predominantly white or predominantly African-American precinct when Dr. Wallace ran as a Democrat in 1986 and ran as a Republican in 1990?
A Well, you also see an impact in reference to the white voters.
And, again, if you look at these particular precincts, normally you will see a change of 20 to 30% in terms of support - actually more than that in a couple of cases - for Wallace the Republican as opposed to Wallace the Democrat.
So it also shows that a significant number of white voters are voting on the basis of party as opposed to voting on the basis of candidate.
Q Among white as opposed to nonwhite voters, where is that impact most pronounced in Charleston County elections that Dr. Wallace was involved in in any of these years?
A The impact is obviously greater in terms of African-American voters.
Q What accounts for that?
A That would be, no doubt, the voting on the basis of party.
Q Is there any other more likely explanation for that, Dr. Moore?

A This would be the dominant explanation. It would not be linked to candidates. It would not be linked to issues. You can have candidates entering in, obviously, to the process, where one of the opponents at that time was former Congressman Mendel Davis. Issues are very eclectic when it comes down to County Council races, but obviously party is the dominant reason in terms of casting the vote for the Democratic Party.

Q Dr. Moore, I want to turn your attention now to Page 37 of your report. This is before you reached the "Conclusion" part of the report. And I believe I'm directing your attention to that last full paragraph that begins with the words, "In conclusion, voting patterns in Charleston County reflect those which are characteristic of the South."

Do you see that paragraph?

A Correct, yes.

Q Dr. Moore, what I want to ask you this is: What have you been able to determine and conclude as a political scientist with regard to the ability of Charleston County Democratic Party adherence, voters who vote with the Democratic Party in this County, to elect candidates if their turnout of their base is an election as it was in 1998?

23 A The Democratic Party candidates have an opportunity to be
24 elected to office under those circumstances.
25 It will probably cost more for a Democratic Party

had to make sure that anything that I did was in the best interest of everybody within the County.

I knew more about North Charleston, so, therefore, I felt that I was a voice for North Charleston to the body; but when it came time to vote on issues, I had to look at the financial and economic and social effect on the entire County on each issue that I voted on.

Q Mayor, how does labeling one's self under a particular party label, Republican or Democrat, affect the person's ability to get votes?

A When I decided to run for County Council, I had to decide which party label I was going to run under. I consider myself as independent as anybody I know. I've never voted a straight party line ticket in any election that I voted in. I vote individuals and I vote issues.

Q In terms of --

A I had to make a choice of where I wanted to spend $7,000 and run as a Republican and have a wonderful opportunity to win, or spend $70,000 and run as a Democrat and probably lose.

Q In terms of the importance to your electoral success, where would you rank incumbency, name recognition, party affiliation? Which would you rank number one of those three?

A Party affiliation, one; name recognition, two; incumbency, three.

Q In terms of your own political party affiliation and how you identified yourself, what was happening to you in 1986, Dr. Wallace?
A I -- having nothing to do with the change, the growth of the Republican Party in the County, because I didn't ever anticipate that I would -- I would be on County Council as long as I had been at that time, nor as long as I am now, certainly aspired to no higher elective office. But I guess my fiscal conservative roots started blossoming more and more. My father had died -- actually, I think by 1980. He actually died in '79. And I just wasn't -- the Democratic Party somehow left the southern conservatives. I didn't leave the Democratic Party; the Democratic Party left me. At least that's my view of it.
And somewhere between '86 and '90, I decided to change to the Republican Party. I've seen others make changes, and where they did with great fanfare. And I -- it was a personal decision. I did it low-key, told the Republican Chairman I didn't want any great announcement, I didn't want a press conference, just wanted to do it and let the voters decide the next election what they thought about it.
Q And that next election was in 1990; was it not?
A It was.
Q Dr. Wallace, from your own perception as having been

involved in every one of those elections, and we will get to

(2)

Supreme Court, U.S.
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No. 04-150

IN THE
Supreme Court of the United States

CHARLESTON COUNTY, SOUTH CAROLINA, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of Private Respondents in Opposition to Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether this Court, absent a very obvious and exceptional showing of error, should review the concurrent findings of fact by two courts below that at-large elections for the Charleston County Council diluted minority voting strength in violation of Section 2 of the Voting Rights Act?

If the Court were to grant certiorari, respondents would request the Court to consider the following additional question presented:

2. Whether the judgment below should be affirmed on the alternative ground that at-large elections were adopted for the Charleston County Council in 1969 with a discriminatory purpose in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments?

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BRIEF OF PRIVATE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Private respondents Lee H. Moultrie, George Freeman, Maggie McGill, and Sandra Fowler respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fourth Circuit's opinion in this case.

STATEMENT OF FACTS

Both the district court and court of appeals fully considered Charleston County's partisanship defense and rejected it. The district court concluded that "the evidence fails to demonstrate that race-neutral factors explain the voting polarization in Charleston County." App. 96a. The court of appeals similarly concluded that the County had produced "no systematic proof to support its claim" that "partisanship rather than race drives the County's racially polarized voting patterns." App. 20a.

The County's own expert, Dr. Ronald Weber, "acknowledged that he could not assess the extent to which racial bias has caused polarized voting in Charleston County and he agreed with other expert witnesses that partisanship and race as determinants of voting are 'inextricably intertwined.'" App. 20a. But even if the effects of partisanship and race on voting could have been isolated and measured, the court of appeals found that "no such evidence was before the district court." *Id.* Another expert for the County, Dr. William Moore, also acknowledged, and discussed at length, "the role that race plays in the political process" in Charleston County. Def. Ex. 14-B, p. 44 (Moore report).

The Section 2 Analysis of the Lower Courts

The courts below applied the analysis set out in *Thornburg v. Gingles*, 478 U.S. 30, 50-1 (1986), in concluding that at-large elections for the Charleston County Council diluted black voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

First, the district court found and the court of appeals

agreed that blacks in Charleston County are geographically compact such that they could constitute a majority in one or more single member districts. App. 10a, 38a. The County does not challenge that finding.

Second, the district court found and the court of appeals agreed that blacks in Charleston County are politically cohesive. App. 10a, 38a. The County does not challenge that finding either.

Third, the district court found and the court of appeals agreed that whites voted sufficiently as a bloc usually to defeat the candidates preferred by black voters. App. 13a-14a, 38a. As noted by the court of appeals, defendants' own expert found "there was racially polarized voting in 25 of the 33 (75.8%) contested general elections for the County Council between 1988 and 2000." App. 16a. Moreover, in the 10 general elections that involved minority candidates, the county's expert found that "white and minority voters were polarized 100% of the time." *Id.* These conclusions were corroborated by the expert for the United States who found racially polarized voting in 94% of the elections between 1984 and 2000. *Id.*

Polarization also extends to the desirability of the at-large system itself. In a 1989 referendum on whether to adopt single member districts, "at least 98% of minority voters endorsed the change, while at least 75% of white voters wanted to retain at-large elections." App. 16a.

There was also evidence that in school board elections, which are non-partisan, racial polarization was if anything more extreme, with white and black voters being polarized in every one of the ten contests that pitted white candidates against black candidates. U.S. Ex 25. Overall, the court of appeals found that "evidence presented by both parties supported the district court's conclusion 'that voting in Charleston County Council elections is severely and characteristically polarized along racial lines.'" App. 16a,

quoting from App. 40a.[1]

Turning to the totality of circumstances, the courts below looked at minority electoral success, one of the "most important" factors identified by this Court in *Gingles*, 478 U.S. at 48 n.15, in assessing a vote dilution claim. Of the 41 people elected to the County Council since 1970, "only three have been minorities." App. 16a-17a. The exclusion of blacks from elected office has been most pronounced during the recent decade. From 1992 to the present, all nine black candidates supported cohesively by black voters were defeated in the general elections. Eighteen (86%) of the 21 candidates of whatever race supported cohesively by black voters were defeated. In 1998, two white Democrats supported cohesively by black voters were elected, but two black Democrats supported cohesively by blacks lost. Joint Ex. 2A, Ex. D (Weber report); Joint Ex. 2C, Table 9 (Weber report); Pl. Ex. 2, p. 33 (Ruoff report). And as the court of appeals further noted, "the rarity with which minorities are elected is not unique to the County Council; disproportionately few minorities have ever won any of the at-large elections in Charleston County." App. 17a.[2]

Other factors contributing to minority vote dilution

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[1]The findings of polarized voting in this case are consistent with those of other courts in South Carolina. *See Colleton County v. McConnell*, 201 F.Supp.2d 618, 641 (D.S.C. 2002) (three-judge court) ("[v]oting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections"); *Burton v. Sheheen*, 793 F.Supp. 1329, 1357-58 (D.S.C. 1992) (three-judge court) ("since 1984 there is evidence of racially polarized voting in South Carolina").

[2] Following the election of five blacks to the nine member school board in 2000, the county legislative delegation, in what the district court described as an "episode[ ] of racial discrimination against African-American citizens attempting to participate in the local political process," App. 67a, tried to change the method of elections to the system used by the County Council and limit the board's fiscal authority. The measures were passed by the legislature, but were vetoed by the governor. App. 67a-68a. As a result of the 2002 elections, the school board now has only one African-American member. App. 46a n.16.

found by the lower courts include: "the County's sheer size;" the use of staggered terms and residency districts; "a de facto majority vote requirement;" "fewer financial resources" available to minority candidates to finance campaigns; "past discrimination that has hindered the present ability of minorities to vote or to participate equally in the political process;" "[t]he on-going racial separation that exists in Charleston County–socially, economically, religiously, in housing and business patterns–[which] makes it especially difficult for African-American candidates seeking county-wide office to reach out to and communicate with the predominantly white electorate;" "significant evidence of intimidation and harassment" of blacks "at the polls during the 1980s and 1990s and even as late as the 2000 general election;" and "incidents of subtle or overt racial appeals" in campaigns, such as white candidates distributing darkened photos of their black opponents to call attention to their race. App. 19a-20a, 22a n.4, 62a, 71a, 78a, 215a.

The lower courts also "thoroughly examined all of the County's evidence" that racial polarization was caused by partisanship, and found it "insufficiently comprehensive or persuasive." App. 21a. The County's expert conceded that statistics could not show partisanship caused white bloc voting. App. 20a. To the extent that minority preferred candidates fared better in non-partisan school board than in County elections, "this was due at least in part to special circumstances like minority candidates' running unopposed, single-shot voting, or a split in the white vote among several white candidates." App. 21a. The County's evidence of two candidates who fared better when they switched parties was found to be "inconclusive." App. 21a. Timothy Scott, a black Republican, who was not supported by black voters, himself denied that partisanship was the explanation for his success. Tr. Trans. 2368 ("partisanship was not a part of the election"). He also testified that the Republican Party had made special and "unprecedented" efforts to insure that he was elected. *Id.* at 2317-18.

The County's expert conceded that "looking at County Council elections since the early 1990s, white Democrats have at least occasionally won, while minority Democrats have

invariably lost." App. 21a. The court of appeals concluded that "even controlling for partisanship in Council elections, race still appears to play a role in the voting patterns of white and minority voters in Charleston County." App. 22a..

Moreover, there was substantial evidence of partisanship being infused by race. The district court found that there was "significant 'white flight' from the Democratic Party in Charleston County since the 1970s," and that the "[r]easons for this flight include the Democratic Party's position on civil rights." App. 42a n.13. Race has become a "wedge issue" used by the Republican Party, whose literature has identified the Democratic Party with the "black block vote" and the NAACP. U.S. Ex. 16, pp. 18-19 (Carter report). As the district court found, in recent years the Democratic Party in Charleston County has been "referred to as the party of the African-Americans" or "'controlled' by African -Americans." App. 82a. The trial court concluded that "there is no evidence that anything other than race explains the severe polarization observed in Charleston County elections." App. 96a-97a.

The courts below, after conducting a "searching practical evaluation" of local electoral conditions in Charleston County, as required by *Gingles*, 478 U.S. at 79, concluded that the challenged at-large system diluted minority voting strength in violation of Section 2. App. 22a-23a.

Discrimination in the Adoption of the At-Large System

Private respondents further alleged that Charleston County's at-large method of elections was invalid because it had been adopted for the purpose of discriminating on account of race.

At-large elections for the County Council were adopted in 1969, and replaced a system of district elections. Charleston County is one of only three counties in South Carolina which continue to elect their county governments at-large. The other two, Hampton and Jasper, are majority black, rural, and have populations of less than 22,000 residents each. App. 34a-35a.

The historical background of the adoption of at-large

elections in Charleston County in 1969 reveals a series of official actions at the local and state levels over an extended period of time taken for invidious purposes. At-large elections were adopted after passage of the Voting Rights Act of 1965 at a time when there were substantial increases in black voter registration in Charleston County and increased black political activity. Pl. Ex. 1, pp. 35-36 (Burton report); App. 99a. At-large elections, with a majority vote requirement, were a well known and widely understood way of diluting minority voting strength, particularly in a place like Charleston County with its sprawling size, majority white electorate, and pervasive white bloc voting. Tr. Trans. 1151-55 (Burton).

The City of Charleston had earlier adopted at-large elections in 1954 to replace its system of single member districts following abolition of the white primary. Historians have acknowledged that this was done for the purpose of diluting the black vote to keep African-Americans from being elected to City Council. Pl. Ex. 1, p. 36 (Burton report).

In 1956 and 1964 the general assembly, upon the recommendation of the county legislative delegation, abolished elections for school board members in predominantly black districts and made the positions appointive by the delegation. Elections for school board members were continued in the majority white districts. Pl. Ex. 1, pp. 37, 44 (Burton report); App. 99a-100a. Defendants' expert Dr. Moore admitted that the appointed/elected system for the school board was "very discriminatory." Tr. Trans. 3015.

The City of Charleston began a series of annexations in 1960, the purpose of which was "to change the City from predominantly African-American to predominantly white," and to keep the city from being controlled by so-called "slum dwellers." Tr. Trans. 1146 (Burton); App. 99a. The Department of Justice ultimately objected in 1974 to seven annexations by the city as "racially motivated." Pl. Ex. 1, pp. 34-35 (Burton report).

Charleston County School District 20 was one of the first school districts in the state ordered to desegregate after the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954).

In response, whites fled the public schools in large numbers. Between 1963 and 1968, the number of white students enrolled in the public schools declined about 50%. Tr. Trans. 936 (Carter); U.S. Ex. 16, pp. 13-14 (Carter report).

In the elections held in 1964, voters in heavily black Charleston precincts were systematically challenged. U.S. Ex. 16, p. 26 (Carter report). Blacks were subjected to literacy tests as a condition for registering to vote. Tr. Trans. 633-34 (Amos-Frazier). On the eve of passage of the Voting Rights Act of 1965, only 37% of the black voting age population was registered, and there were no black elected officials in the entire state. Pl. Ex. 1, p. 10 (Burton report). As late as 1970, there was only one black elected official in Charleston County, St. Julian Devine. Tr. Trans. 1186 (Burton).

In 1967, the state legislature, at the request of the county delegation, enacted a consolidation bill that created the Charleston County School District composed of the existing eight "Constituent" school districts. The bill blocked any transfers, and thus desegregation, across district lines. Pl. Ex. 1, p. 44 (Burton report). The consolidation bill also continued the discriminatory appointed/elected scheme for school board members. *Id.*; Tr. Trans. 3016 (Moore). The legislative delegation that set up the appointed/elected system was the same delegation that proposed at-large voting for the County Council in 1967. Pl. Ex. 1, p. 45 (Burton report).

The chief sponsors of the change to at-large voting for the County Council had proven records of opposing equal voting and other rights for blacks. Tr. Trans. 1147, 1161 (Burton); Pl. Ex, 1, p. 42 (Burton report). No supporter of at-large elections argued that it was a reform measure needed to promote or insure good government. To the extent that "good government" was discussed, it was in support of maintaining the existing district system. Pl. Ex. 1, p. 30 (Burton report). Defendants' argument that the at-large system was enacted because the Supreme Court in *Avery v. Midland County*, 390 U.S. 474 (1968), had applied the one person, one vote rule to county level elections, is rebutted by the letter from the state attorney general that the decision did not require the adoption of at-large elections. U.S. Ex. 74(D) ("[i]f the populations are

fairly close, separate elections may be provided for from each district").

Plaintiffs' expert, Dr. O. Vernon Burton, concluded that the change to at-large elections in 1969 had been made for a racially discriminatory purpose. The district court, while it held that "the timing of the General Assembly's adoption of the at-large system raises suspicions," App. 101a, ruled against the purpose claim. The court of appeals held that "because we affirm the district court's finding that the County's at-large system violated § 2 by diluting minority voting strength, we do not need to reach the private plaintiffs' claim that the at-large system violated § 2 by intentionally discriminating against minority voters." App. 10a n2.

SUMMARY OF THE ARGUMENT

The plaintiffs rebutted the County's evidence of partisanship. The County's burden of proof argument is thus academic.

The concurrent findings by the courts below that at-large elections for the County Council diluted minority voting strength were not "very obvious and exceptional error." In addition, there is no split among the circuits concerning the stage of a Section 2 analysis at which evidence of partisanship should be considered.

At-large elections were adopted for the County Council in 1969 with a discriminatory purpose, which is another reason for denying the petition for writ of certiorari.

REASONS FOR DENYING THE PETITION

I. Plaintiffs Negated the County's Partisanship Evidence; Its Burden of Proof Argument Is Therefore Academic

The sole question presented by the County is "whether the Court of Appeals should have required Plaintiffs to negate the evidence of partisanship in order to prove the existence of white bloc voting under *Gingles*." Petition for Writ of Certiorari, p. ii. Plaintiffs did, in fact, negate the County's

partisanship evidence, such as it was, and as a result the County's burden of proof argument is academic and does not present an issue worthy of review. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (to warrant review an issue must be "beyond the academic").

A. Plaintiffs Negated the County's Evidence of Partisanship

Plaintiffs controlled for partisanship by examining the votes received by black and white candidates in Democratic primaries and in elections for the school board, in which the partisan element was constant or not present. Tr. Trans. 314-15 (Arrington), 441 (Ruoff). Despite the absence of a partisan cue in the primary and non-partisan school board elections, black and white voters still voted differently. As the district court noted, "polarization in school board races, in fact, closely mirrors that found in the county council elections." App. 46a n.16.

Aside from an analysis of elections, plaintiffs also produced substantial evidence, which goes back decades but continues to the present day, that the partisan divide in Charleston County is based directly upon race. That evidence included "white flight" from the Democratic Party because of its inclusion of blacks and its position on civil rights; testimony from local politicians such as Timothy Scott that partisanship was not a part of his election to office; racially divisive elections in which the Democratic Party was identified with the "black block vote;" references in recent years to the Democratic Party as "the party of the African-Americans;" racial campaign appeals that are "a part of the political dialogue in Charleston County," App. 82a; and the harassment and intimidation of minority voters by party operatives.[3] As the trial court found, "race infuses and informs" political behavior in Charleston County. App. 73a.

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[3]The trial court dismissed the notion that these intimidating and harassing acts were irrelevant as being prompted by "partisan zeal," concluding that "their impact is undeniably racial." App. 67a.

B. The County's Burden of Proof Argument Is Academic

Regardless of who had the burden of proof, and at what stage of the litigation, the County's evidence in this case failed to show that partisanship, rather than race, was the cause of white bloc voting. As the lower court concluded, the County's expert acknowledged that he could not assess the extent to which racial bias has caused polarized voting in Charleston County and he agreed with the other expert witnesses that partisanship and race as determinants of voting were "inextricably intertwined." App. 20a. But even if the effects of partisanship and race on voting could have been isolated and measured statistically, the lower court found that "no such evidence" was presented by the County to the district court. *Id.*

The County's evidence was entirely anecdotal and was "insufficiently comprehensive or persuasive." App. 21a. To the extent that minority preferred candidates fared better in non-partisan school board than in County elections, this was due in part to special circumstances like minority candidates' running unopposed, single-shot voting, or a split in the white vote among several white candidates. *Id.* The County's evidence of party switching was also "inconclusive," while there was "decisive" evidence of severe voting polarization and minimal minority electoral success. *Id.* The court of appeals concluded that "even controlling for partisanship in Council elections, race still appears to play a role in the voting patterns of white and minority voters in Charleston County." App. 22a. As is apparent, there is no merit to the County's contention that "it was error for the courts below to refuse to consider the County's evidence of partisanship as the likely reason for white bloc voting." Petition for Writ of Certiorari, p. 20. To the contrary, the courts fully considered such evidence but found it lacking and unpersuasive.

In sum, there was no credible, or unrebutted, evidence of partisanship unrelated to race before the trial court. Whether or not plaintiffs had the burden of rebuttal as part of the *Gingles* inquiry is therefore an academic question that can have no practical impact on the outcome of the litigation and does

not warrant review by this Court.

II. The Concurrent Findings by Two Courts Below of a Section 2 Violation Were not "Very Obvious and Exceptional Error"

This Court has held that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *Accord, Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996). In this case, there is no very obvious and exceptional showing that the findings of the courts below of the factors identified in *Gingles*, 478 U.S. at 50-1, and the Senate report, S.Rep. No. 417, 97th Cong., 2d Sess. 28-9 (1982), as probative of minority vote dilution, as well as its ultimate finding of a Section 2 violation, were error. The County does not in fact argue, nor has it shown, that the findings of the courts below were erroneous.

As the lower courts found, blacks in Charleston County are geographically compact and politically cohesive within the meaning of *Gingles*. App. 13a-14a. The courts also found that "minority-preferred candidates are usually defeated by white bloc voting." App. 13a. While proof of the *Gingles* factors is not conclusive, the Court in *Johnson v. DeGrandy*, 512 U.S. 997, 1012 and n.10 (1994), held that "lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the three essential *Gingles* factors."

In addition to the *Gingles* conditions, the courts below found that plaintiffs proved other factors under the totality of circumstances analysis which demonstrated that the at-large system violated Section 2. Those factors included: severe racially polarized voting; few minority elected officials; the County's large size; the use of staggered terms and residency districts; a *de facto* majority vote requirement; limited financial resources available to minority candidates; past discrimination that has hindered the present ability of minorities to vote or to participate equally in the political process; on-going racial separation in all areas of public and

private life; incidents of subtle or overt racial appeals; "white flight" from the Democratic Party which has undermined efforts to build biracial coalitions; and significant evidence of intimidation and harassment of blacks at the polls. App. 16a-17a, 19a-20a, 22a n4, 42a n.13, 62a, 71a, 78a.

There is no very obvious and exceptional showing that the findings of the lower courts of a Section 2 violation were error. Under the circumstances, the petition for a writ of certiorari should be denied.

III. There Is no Split Among the Circuits

The courts below treated evidence that white bloc voting resulted from partisanship rather than race as relevant to the Section 2 inquiry. In this they agreed with every circuit, as shown by the cases canvassed by the court of appeals, *i.e.*, *Goosby v. Town Bd.*, 180 F.3d 476, 493 (2d Cir. 1999); *Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997); *Sanchez v. Colorado*, 97 F.3d 1303, 1313 (10th Cir. 1966); *Uno v. City of Holyoke*, 72 F.3d 973, 980-81 (1st Cir. 1995); *Nipper . Smith*, 39 F.3d 1494, 1524-25 & n.60 (11th Cir. 1994) (*en banc*); *LULAC v. Clements*, 999 F.2d 831, 891-92 (5th Cir. 1993).

Petitioners try to find a conflict among the circuits as to the stage at which evidence of partisanship is considered, but that is a procedural matter of little or no significance in Section 2 cases. Notably, this imagined "conflict" is not even the subject of the Question Presented in the petition (which deals instead with the burden of proof). In addition, the courts that have addressed the issue of when partisanship should be considered have recognized that timing does not effect the outcome of the Section 2 inquiry.

For example, the Seventh Circuit, in discussing the relevance of non-racial explanations for white bloc voting, said:

> the circumstances of individual elections. . . matter to the totality-of-circumstances inquiry even if not to the threshold inquiry, and in principle they matter to the threshold case as

> well. . . . As a rule, however, it would be best for district judges to postpone this kind of inquiry to their consideration of the totality of the circumstances, the second part of the *Gingles* inquiry.

Milwaukee Branch of the N.A.A.C.P., 116 F.3d at 1199.

Even in *LULAC*, the one case where a Circuit has held that non-racial causes for white voter behavior are relevant at the third "pre-condition" rather than at the "totality of the circumstances" stage, the court qualified its approach. After holding that clear evidence of a partisan basis for white bloc voting meant plaintiffs had failed to prove the third pre-condition, the Fifth Circuit then proceeded to analyze the causes of white bloc voting under the totality of circumstances inquiry: "Even assuming arguendo that plaintiffs have met the *Gingles* threshold by showing racial bloc voting, the totality of circumstances in the record cannot support a § 2 violation." 99 F.3d at 879.

Each of the several opinions in *Gingles* recognized that a vote dilution inquiry involves a number of factors. This Court gave some guidance in how to address the various factors, but commanded no magic formula. The court below, and most other courts, have found the most appropriate stage to consider non-racial explanations for white bloc voting to be at the totality of circumstances stage, but no court has held or suggested that the result in any given case would be different if an inquiry into partisanship were undertaken at a different place in the analysis or at a different page or paragraph of an opinion.

As is apparent, the County's claim of a conflict in the circuits can have no meaningful impact upon the current litigation. The evidence regarding partisanship, no matter at which stage of the case it is reviewed--the *Gingles* third factor stage or the totality of circumstances stage--still amply supports the lower courts' finding of legally significant racial bloc voting. Where the resolution of even a clear conflict among the circuits is irrelevant to the ultimate outcome of a case, certiorari is properly denied. *See The Monrosa v. Carbon*

Black, Inc., 359 U.S. 180, 184 (1959) (the Court decides questions "in the context of meaningful litigation"); *Sommerville v. United States*, 376 U.S. 909 (1964).

IV. At-large Elections Were Adopted with a Discriminatory Purpose

An alternative ground for denying the petition for writ of certiorari is that at-large elections were adopted in 1969 for a discriminatory purpose.[4] *See United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) ("the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted").

Whether the proof of a discriminatory purpose is analyzed here under Section 2 of the Voting Rights Act or under the equal protection clause of the Fourteenth Amendment, the result is the same. The Senate report incorporates the analysis in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68 (1977), for proof of a discriminatory purpose under Section 2. S.Rep. No. 417 at 27 n. 108. Aside from direct "smoking gun" evidence, factors probative of a discriminatory intent under *Arlington Heights*, 429 U.S. at 264-68, include: (1) whether the impact of the official action bears more heavily on one group than another; (2) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes; (3) the sequence of events leading up to the challenged decision; (4) any departures from the normal procedural sequence; (5) substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one

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[4]The 1969 voting change was precleared by the Department of Justice pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Preclearance under Section 5 is not a bar to a subsequent suit under Section 2 alleging that a voting practice has a discriminatory intent or result. *See* 42 U.S.C. § 1973c; *Gingles v. Edmisten*, 590 F. Supp. 345, 351 (E.D.N.C. 1984) (successful challenge to multi-member legislative districts following Section 5 preclearance), *aff'd sub nom. Thornburg v. Gingles.*, 478 U.S. at 80.

reached; and, (6) the legislative or administrative history, including contemporaneous statements by members of the decisionmaking body.

Here, the contemporaneous direct and circumstantial evidence of purposeful discrimination is strong and convincing. The impact of the at-large system adopted in 1969 bears more heavily on blacks than whites, an impact that was readily foreseeable. The historical background of the decision reveals a series of official actions taken for invidious purposes. The sequence of events leading up to the challenged decision also reveals a series of official actions taken for invidious purposes. At-large elections were adopted after passage of the Voting Rights Act and in response to substantial increases in black voter registration in Charleston County and increased black political activity. At-large elections were a known way of diluting minority voting strength, particularly in the context of Charleston County with its sprawling size, use of a majority vote requirement, and chronic racial bloc voting. The chief sponsors of the change to at-large voting had proven records of opposing equal voting and other rights for blacks.

Other actions were being taken during this period of time in Charleston County to maintain white control of the electorate, including annexations of white population to maintain Charleston as a majority white city, abolishing elections for the school board in majority black districts only, and measures to insure that school consolidation would not lead to integration. No supporter of at-large elections argued that it was a reform measure needed to promote or insure good government. To the extent that good government was discussed, it was in support of maintaining the existing district system. There were no partisan or political justifications advanced to support the adoption of at-large elections.

The only countervailing argument by the County was that it was required to change to at-large elections because of this Court's decision in *Avery v. Midland County*, and that it was told this by the South Carolina Attorney General. First, the bill to change to at-large elections was introduced in 1967, prior to the *Avery* decision, and was passed in unchanged form in 1969. Second, the attorney general wrote that the existing

districts were malapportioned in light of *Avery*, but he did not say that at-large elections were required. He stated that properly apportioned districts were always an option.

Given the strong proof in this case of the factors identified in *Arlington Heights*, affirmance would be warranted on the alternative ground that the at-large system was adopted with a discriminatory purpose. And accordingly, that is another reason for denying the petition for writ of certiorari

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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In the Supreme Court of the United States

CHARLESTON COUNTY, SOUTH CAROLINA, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether both courts below erred in determining that petitioners had failed to show, for purposes of this case alleging that petitioners' at-large method of electing its County Council violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973, that partisanship, not race, was the cause of the racially divergent local voting patterns.

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In the Supreme Court of the United States

No. 04-150

CHARLESTON COUNTY, SOUTH CAROLINA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 365 F.3d 341. The opinion of the district court granting judgment to respondents (Pet. App. 24a-102a) is reported at 316 F. Supp. 2d 268. The opinion of the district court adopting the Magistrate's Report and Recommendation (Pet. App. 103a-122a) is reported at 318 F. Supp. 2d 302. The Magistrate's Report and Recommendation (Pet. App. 123a-154a) is reported at 318 F. Supp. 2d at 313, following the district court opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. 155a-156a) was entered on April 29, 2004. The petition for a writ of certiorari was filed on July 28, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

The United States and private plaintiffs, four Charleston County voters, filed suit against Charleston County, the Charleston County Council and its members, and the Charleston County Election Commission (collectively, the County), alleging that the County's at-large method of electing the nine-member County Council dilutes minority voting strength in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

1. Section 2 prohibits States or localities from imposing or applying any standard, practice, or procedure "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973(a). A violation of that provision is "established if * * * it is shown that the political processes leading to nomination or election * * * are not equally open to participation by members of [a protected class] * * * in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). A Section 2 plaintiff thus need not prove that a voting process or structure was adopted or maintained with discriminatory intent; rather, a Section 2 violation occurs when a voting standard, practice, or procedure interacts with the effects of past discriminatory practices to result in "the denial of equal access to any phase of the electoral process for minority group members." S. Rep. No. 417, 97th Cong., 2d Sess. 30 (1982); see *Chisom* v. *Roemer*, 501 U.S. 380, 394 (1991).

Claims that at-large or multimember elections dilute minority voting strength in violation of Section 2 are governed by the framework set forth in *Thornburg* v.

Gingles, 478 U.S. 30 (1986). Plaintiffs must demonstrate that the protected minority group is sufficiently large and geographically compact to constitute a majority in a hypothetical single-member district; the protected minority group is politically cohesive; and the white majority votes sufficiently as a bloc to enable it usually to defeat the minority group's preferred candidate. *Id.* at 50-51; *Growe* v. *Emison*, 507 U.S. 25, 39-40 (1993). Proof of those three factors establishes a strong presumption that the challenged electoral structure itself is affecting voting patterns in a manner to "minimize or cancel out" the voting strength of minority voters. *Gingles*, 478 U.S. at 48; see, *e.g.*, *Jenkins* v. *Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993), cert. denied, 512 U.S. 1252 (1994); *NAACP* v. *Niagara Falls*, 65 F.3d 1002, 1019 n.21 (2d Cir. 1995).

The ultimate issue of vote dilution is a factual one to be determined based on the totality of circumstances in a particular jurisdiction. *Johnson* v. *De Grandy*, 512 U.S. 997, 1011-1012 (1994). The Senate Report accompanying the 1982 amendments to Section 2 lists a number of factors relevant to that analysis.[1] This Court

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[1] Those factors include the history of voting-related discrimination in the relevant political subdivision at issue; the extent to which voting in that political subdivision is racially polarized; the extent to which the relevant political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political processes; the use of racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office

has recognized the relevance of the Senate Report factors and has identified the two most important as (a) the extent to which voting in the jurisdiction is racially polarized, and (b) the extent to which members of the minority group have been elected to public office in the jurisdiction. See *Gingles*, 478 U.S. at 48 & n.15. Once a plaintiff proves racially polarized voting and minimal minority candidate success, the other factors are merely "supportive of, but *not essential to*" a plaintiff's Section 2 claim. *Id.* at 49.

2. The Charleston County Council consists of nine members elected at large to four-year staggered terms. Elections are conducted every two years on a partisan basis; candidates run from four residency districts.[2] According to the 2000 Census, Charleston County has a total population of 309,969, making it the third most populous county in South Carolina. Close to 65% of the voting age population is white, and almost 31% is black. U.S. Exhs. 106, 107. Since 1970, only three minority candidates have been elected to the County Council. Since 1990, only one minority candidate has been elected to the County Council, and that candidate has never been the preferred candidate of minority voters in Charleston County. Pet. App. 14a, 17a.

Statistical evidence supporting the three *Gingles* preconditions was undisputed: the minority population in Charleston County is sufficiently large and geographically compact to constitute a majority in a single-member district, minority voters are politically co-

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in the jurisdiction. S. Rep. No. 417, 97th Cong., 2d Sess. 28-39 (1982).

[2] Three candidates each are elected from two different residency districts, two candidates are elected from a third residency district, and one candidate is selected from a fourth district.

hesive, and Charleston County elections are characterized by substantial racial bloc voting. Pet. App. 10a. As to the third precondition, the evidence showed that in County Council general elections from 1988 to 2000, white voters cohesively supported a candidate in 31 of 33 (94%) elections, and minority voters cohesively supported a candidate in 28 of 33 (84.8%) elections. Jt. Exh. 2A, at 42, 53. The evidence also showed that 25 of 33 elections were racially polarized, in that white voters preferred candidates other than the candidates preferred by minority voters. *Id.* at 53-54. Finally, in 78.6% of the elections in which minority voters voted cohesively, they were nonetheless unable to elect their candidate of choice to the County Council. *Id.* at 54. See also Pet. App. 18a (noting testimony by the County's own expert that "minority-preferred candidates, whatever their race, generally were defeated by white bloc voting").

Evidence concerning the Senate Report factors was also largely undisputed. With respect to racially polarized voting, the County's expert found that white and minority voters were cohesive in support of different candidates for County Council elections in the overwhelming majority of elections, and that the "two groups of voters were either moderately or strongly polarized" 75.8% of the time. Jt. Exh. 2A, at 45; see *id.* at 53. The United States presented evidence showing that voting was racially polarized in all but one County Council election from 1984 to 2000. See U.S. Exh. 14, Tbls. 6-9; Tr. 295. The United States also presented evidence demonstrating that Charleston County presents an uncommonly large voting district, that residency requirements act as a de facto majority vote requirement, see Pet. App. 19a, and that past and

present racial discrimination continues to affect the right to vote in Charleston County.

While the County did not contest the United States' statistical evidence or that of its own expert establishing racial bloc voting, the County claimed that those results are due to partisanship, not race. Specifically, the County asserted that minority-preferred candidates are Democratic candidates, and that Democratic candidates simply no longer win elections in Charleston County. The County attempted to support its claim of partisan influence on voting only with the specific outcomes of a few elections. The County relied on the recent success of one minority Republican candidate, decreased minority support for two candidates after they switched from the Democratic to the Republican party, and the election of minority candidates to the school board. See Pet. App. 20a-21a.

To counter the County's evidence, the United States introduced statistical evidence demonstrating that racially divergent voting patterns are present even in elections in which partisan cues are controlled or absent. Using the same type of statistical analyses employed in *Gingles*, the United States' evidence showed that, in partisan elections for County Council, minority voters provide more cohesive support to minority Democratic candidates than they do for white Democratic candidates, and white voters provide less support to minority Democratic candidates than to white Democratic candidates. See U.S. Exh. 14, Tbl. 9. Those differences result in minority-preferred minority candidates losing more often than minority-preferred white candidates. U.S. Exh. 68A; Tr. 316-318; U.S. Exh. 14, at 28-29. The County's evidence showed similar results. Jt. Exh. 2B, Fig. 8. The United States also provided evidence that, in non-partisan school

board elections involving minority and white candidates, white voters provide more cohesive support for white candidates than for minority candidates, and minority voters provide more cohesive support for minority candidates than for white candidates. U.S. Exh. 14, Tbl. 16. The County's own data show that white voters are cohesive in their refusal to support minority candidates. Jt. Exh. 2B, Figs. 11, 12, 13; Jt. Exh. 2B, at H48-H66. Over a ten-year period, in all contests in which a minority candidate was running against a white candidate, or in which one or more minority candidates were running against one or more white candidates, the minority candidate finished first among the minority voters, and a white candidate finished first among the white voters. U.S. Exh. 25.

3. The district court found that the at-large method of electing Council members in Charleston County diluted minority voting strength, thereby violating Section 2 of the Voting Rights Act. The court first determined that the United States' and private plaintiffs' evidence satisfied the three *Gingles* preconditions.[3] As to the third *Gingles* precondition, the district court found that "in a legally significant portion of [recent County Council elections] white bloc-voting was sufficient to defeat the combined efforts of non-white voters and any white crossover votes." Pet. App. 121a-122a. As the court noted, "[the County's] expert admits no less." *Id.* at 122a.

After considering the totality of circumstances, the court held that the at-large method of electing Council

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[3] In its Order granting summary judgment to the United States as to the three *Gingles* preconditions, the district court adopted and incorporated the findings of the magistrate court, which had first considered the issue. See Pet. App. 103a-122a.

members dilutes minority voting strength. The district court found evidence of the two most important factors —the polarization of voting in the political subdivision and the fact that members of the minority group have not been elected to public office in the jurisdiction in significant numbers, see *Gingles*, 478 U.S. at 48-49 n.15 —weighed heavily in favor of a Section 2 violation. Pet. App. 48a. The district court also noted that Charleston County was an uncommonly large voting district, that the County had a de facto majority vote requirement, and that racial discrimination continued to affect minority voting. *Id.* at 96a-97a.

The district court rejected the County's partisanship defense. Following Fourth Circuit precedent, the district court considered the evidence of partisanship when it analyzed the "totality of the circumstances." See *Lewis* v. *Alamance County*, 99 F.3d 600, 615 n.12 (4th Cir. 1996), cert. denied, 520 U.S. 1229 (1997). The court found that the County's evidence "fails to demonstrate that race-neutral [partisanship] factors explain the voting polarization in Charleston County." Pet. App. 96a. The district court also found that "there is no evidence that anything other than race explains the severe voting polarization observed in Charleston County." *Ibid.*

4. The court of appeals affirmed. The court began by rejecting the County's claim that the district court erred in considering the County's causation evidence only in the "totality" analysis. The court relied on its earlier decision in *Alamance County* which held, in agreement with the majority of courts of appeals that have addressed the issue, that causation evidence is to be considered only in the "totality of circumstances" stage. Pet. App. 13a.

The court then rejected the County's contention that the district court's finding of vote dilution was clearly erroneous. While the court of appeals acknowledged that the County had provided some evidence of partisanship, it concluded that "there was no systematic proof to support [the County's] claim" that partisanship differences drive racially polarized voting patterns. Pet. App. 20a. The court noted that each party's expert admitted that race and partisanship, as determinants of voting, are "inextricably intertwined," and that evidence that might isolate and measure the influence of each on voting patterns was not presented to the district court because it was either unavailable or uncollected. *Ibid.* The court also characterized the County's evidence of partisanship influences on voting patterns as purely "anecdotal." *Ibid.* The court noted that the evidence of racial polarization and minimal minority electoral success, the two most important factors to consider in Section 2 cases, *Gingles*, 478 U.S. at 48 n.15, was "uncontroverted." Pet. App. 15a. The court concluded that the district court "was faced with inconclusive evidence of partisanship as the determinant of voting, but decisive[] evidence of severe voting polarization, minimal minority electoral success, and an uncommonly large voting district." *Id.* at 21a (internal quotation marks omitted). In those circumstances, the court held, "it was not clearly erroneous" for the district court to conclude that racially polarized voting in Charleston was not caused by some other, non-racial factor, and the court affirmed the district court's judgment that the County's electoral system violated Section 2. *Id.* at 22a-23a.

ARGUMENT

Petitioners urge this Court to grant the petition for a writ of certiorari in order to resolve the question of the proper stage in the Section 2 analysis at which evidence of non-racial causation should be considered. Petitioners argue that if causation evidence is relevant to the *Gingles* precondition analysis, the courts below erred by considering their causation evidence (*i.e.*, that divergent voting patterns among black and white voters were better explained by partisanship differences rather than race) only in the "totality of circumstances" analysis. Further review is not warranted, because the decision below is correct and both courts below correctly concluded that petitioners' evidence was insufficient to prove non-racial causation at *any* stage of the analysis. Accordingly, this case does not provide an appropriate vehicle to address the question of whether, if non-racial causation were proven, it would have to be taken into account at the precondition stage of the analysis or in the course of determining whether a Section 2 claim has been made out based on the totality of the circumstances.

1. The court of appeals correctly held that causation should be considered as part of the inquiry into the totality of the circumstances, after the three *Gingles* preconditions have been satisfied. In *Gingles*, eight Justices agreed that causation evidence was not the focus of the inquiry into the three *Gingles* preconditions. Justice Brennan, joined by three Justices, rejected the need for *any* causation inquiry at any stage, stating that "[f]or purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent." 478 U.S. at 62. Although Justice O'Connor, joined by three other Justices, believed that causation

evidence was ultimately relevant, she "agree[d] [with the plurality] that defendants cannot rebut" the showing of minority political cohesion and usual minority defeat due to racial bloc voting by the majority —the second and third *Gingles* factors—"by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race." *Id.* at 100. Accordingly, eight Justices in *Gingles* agreed that causation should not be considered as part of the inquiry into the *Gingles* preconditions.

The court of appeals followed *Gingles* in determining that "the approach most faithful to the Supreme Court's case law 'is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, but relevant in the totality of circumstances inquiry.'" Pet. App. 11a (quoting *Alamance County*, 99 F.3d at 615-616 n.12). As the court explained, the *Gingles* inquiry into the three preconditions is a "preliminary one, designed to determine whether an at-large system *potentially* violates § 2." Pet. App. 12a (citing *Growe* v. *Emison*, 507 U.S. 25, 40-41 (1993)) (emphasis added). An actual violation, however, is proven only after a court conducts an "inclusive evaluation of the totality of the circumstances" operating in a given jurisdiction, which "is tailor-made for considering why voting patterns differ along racial lines." Pet. App. 12a. To "expand[] the inquiry into the third *Gingles* precondition to ask not merely whether, but also why, voters are racially polarized * * * would convert the threshold test into precisely the wide-ranging, fact-intensive examination it is meant to precede." *Id.* at 12a-13a. Accord *Sanchez* v. *Colorado*, 97 F.3d 1303, 1313 (10th Cir. 1996) (third *Gingles* precondition asks "*how* voters vote, not *why* voters voted that way"), cert. denied, 520 U.S. 1229 (1997).

The majority of courts to have considered the issue agree. See *Goosby* v. *Town of Hempstead*, 180 F.3d 476, 493 (2d Cir. 1999), cert. denied, 528 U.S. 1138 (2000); *Milwaukee Branch of the NAACP* v. *Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997), cert. denied, 522 U.S. 1076 (1998); *Uno* v. *City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); *Nipper* v. *Smith*, 39 F.3d 1494, 1513-1514 (11th Cir. 1994) (en banc), cert. denied, 514 U.S. 1083 (1995). One court of appeals, however, appears to have adopted a different approach, under which causation is taken into consideration in the course of analyzing the third *Gingles* precondition. See *League of United Latin American Citizens* v. *Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc), cert. denied, 510 U.S. 1071 (1994); cf. *Clarke* v. *City of Cincinnati*, 40 F.3d 807, 813 n.2 (6th Cir. 1994) (reserving the question whether to follow *Clements*), cert. denied, 514 U.S. 1109 (1995).

2. The question whether causation is properly considered in the Section 2 analysis as an aspect of the totality of the circumstances, or whether instead it should be viewed as evidence bearing on whether the *Gingles* preconditions have been proven, is not presented by this case. Both courts below concluded that petitioners had failed to show that partisanship, rather than race, explained the voting patterns at issue in this case. Because petitioners did not prevail on their partisanship causation theory, the stage of the analysis at which partisan causation is considered does not matter in this case, and further review is not warranted.

a. Petitioners' causation argument would require them to demonstrate that partisanship differences (or some other race-neutral factor) better explain divergent voting patterns than does race. Petitioners failed

to carry that burden. They did not conduct a statistical causation analysis to show the effect of partisanship on voting patterns.[4] Indeed, both of petitioners' experts conceded that they could have collected, but did not collect, the necessary data to measure for partisanship, and therefore they could not perform causal analyses isolating the effects of partisanship on voting behavior. Tr. 1991-1992, 2060-2061, 2065-2067, 2904-2905, 2908-2909. Moreover, one of those experts acknowledged that race and partisanship are highly correlated in Charleston County, and that he could not determine the extent to which either racial attitudes or partisan attitudes contributed to polarized voting. Tr. 2039.

Rather than provide the district court with a probative causal analysis of the effects of partisanship on voting patterns to support their claim, petitioners presented only limited, anecdotal evidence. The entirety of this evidence consisted of (1) the recent election of one minority Republican to the County Council; (2) decreased minority support for two Republican candidates for County Council after the candidates switched parties; and (3) the election of minority candidates to the school board in non-partisan elections. See Pet. App. 20a-21a.

b. The district court concluded that, absent any statistical analyses to support petitioners' claim, their causation evidence was "insufficiently comprehensive" and that a "more exacting inquiry" is required. Pet. App. 91a. Because the County's evidence was "inherently more speculative and subjective than the other

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[4] After the close of discovery, the County attempted to supplement its evidence with an additional statistical analysis. That analysis was properly rejected as untimely, and the County did not challenge that ruling on appeal. Pet. App. 92a n.38.

methodologies identified by the experts for proving cause," the court correctly gave it limited weight in the court's overall analysis. *Ibid.* As the court explained, it "simply [could not] conclude on the strength of isolated instances that party affiliation better explains the patterned-defeat [of minority-preferred candidates] in Charleston County." *Ibid.*

c. The court of appeals affirmed the district court's finding that petitioners had failed to prove their causation case. The court characterized the County's evidence of partisanship as "anecdotal" and "far from persuasive," Pet. App. 20a, 21a, and noted that "there was no systematic proof to support [the County's] claim," *id.* at 20a. Based on its own review of the evidence, the court of appeals found that "[i]n the end, the district court was faced with inconclusive evidence of partisanship as the determinant of voting." *Id.* at 21a. By contrast, the court explained that the district court had before it "decisive evidence of severe voting polarization, minimal minority electoral success, and an uncommonly large voting district." *Ibid.* (internal quotation marks omitted). Under those circumstances, the court of appeals correctly concluded that the district court, having "conducted a searching practical evaluation of local electoral conditions," *id.* at 22a-23a (internal quotation marks omitted), had reached factual conclusions about the presence of vote dilution that were "not clearly erroneous." *Id.* at 23a.

3. The conclusions of both courts below that petitioners were unable to show that partisanship, rather than race, could explain the usual defeat of minority-preferred candidates in Charleston is sufficient to resolve the case. This Court does not ordinarily undertake review of such concurrent findings of fact by two lower courts, see *Graver Tank & Mfg. Co.* v. *Linde Air*

Prods. Co., 336 U.S. 271, 275 (1949), and, indeed, petitioners do not seek such review. But because the concurrent factual findings of the two lower courts are sufficient to resolve this case, this case is not a suitable vehicle to consider the correct analytical approach to a case in which voting behavior *is* shown to be caused by partisanship, rather than race. Accordingly, further review is not warranted.[5]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2004

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[5] It may well be that the analytical question petitioners attempt to present is in any event of insufficient practical importance to warrant this Court's review. A Section 2 defendant who is able to show that partisanship provides a better explanation than race for a pattern of usual defeat of minority-preferred candidates is likely ultimately to prevail, regardless of the precise stage of the inquiry in which that evidence is considered.

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UNITED STATES OF AMERICA, *et al.*,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

In their Petition for a Writ of Certiorari, Petitioners Charleston County, South Carolina, et al. (collectively, the "County") demonstrated that a conflict exists among the Court of Appeals regarding the burden of proof in a case brought under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. Specifically, certain Circuits hold that the question of whether differences in the voting behavior of black and white voters may be explained by differences in partisan affiliation should be addressed only when the court examines the "totality of circumstances" under Section 2. See, e.g., *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 493 (2d Cir. 1999). By contrast, the Fifth Circuit holds that this question should be addressed at an earlier stage, namely, when the court decides whether plaintiffs have proved the three "necessary preconditions" specified in *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

See League of United Latin American Citizens, Council No. 4434 v. Clements (LULAC), 999 F.2d 831 (5th Cir.1993) (en banc) *cert. denied*, 510 U.S. 1071 (1994).

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE SPLIT AMONG THE CIRCUITS REGARDING VOTING CAUSATION

In opposing the Petition, the Private Respondents claim that "There Is no Split Among the Circuits" regarding this issue. Brief for Private Respondents in Opposition ("Priv. Resp. Brief") at 12. The Private Respondents are simply wrong. Even a cursory comparison of *LULAC* with the other cases cited above demonstrates the existence of the conflict. Indeed, the Fourth Circuit has acknowledged the conflict both in this case, *see* App. 12a-13a, and in *Lewis v. Alamance County*, 99 F.3d 600, 615 (4th Cir. 1996) (noting that courts of appeals "are still in disagreement about the stage in the vote dilution inquiry in which causation evidence is appropriate").

The United States acknowledges the existence of the conflict, Brief for the United States in Opposition ("U.S. Brief") at 12, but argues that eight justices in *Gingles* "agreed that causation evidence was not the focus of the inquiry into the three *Gingles* preconditions." *Id.* at 10. To be sure, Justice Brennan and three other Justices took the position that causation is irrelevant to this inquiry. But it is far from clear that Justice O'Connor and the three Justices who joined her opinion agreed. On the one hand, Justice O'Connor's opinion states that

> Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for

> electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry.

478 U.S. at 101. On the other hand, the opinion also stated that

> Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates.

Id.

The court in *LULAC* certainly did not read *Gingles* as preventing the consideration of voting causation at the precondition stage. *See* 999 F.2d at 850-61. Nor did the Sixth Circuit in *Clarke v. City of Cincinnati*, which considered whether incumbency could be construed as a cause of white bloc voting. 40 F.3d 807, 812-14 (6th Cir. 1994). The Court in that case found that a desire to protect incumbents did not constitute a racial cause of white voting patterns, and thus the claim failed at the precondition stage. *Id.* at 813-14.

Thus, a split in the Circuits exists, and Justice O'Connor's opinion in *Gingles* does not resolve it. Accordingly, this Court should grant certiorari to resolve the conflict among the circuits.

Moreover, contrary to what Respondents argue, the question of whether causation is considered as part of the inquiry into the *Gingles* preconditions or as part of the inquiry into the totality of circumstance is a critical one. The United States argues that this Court should follow other Circuits that have refused to consider voting causation in the context of the *Gingles* preconditions. It argues that because the preconditions are merely a preliminary matter, any discussion of voting causation should be postponed until the totality of the circumstances inquiry. U.S. Brief at 12. However, this is a false assumption. Courts do not treat the *Gingles* preconditions as a mere preliminary matter, and the United States admits as much, arguing in another portion of its brief that the preconditions establish "a strong presumption" of liability. *See* U.S. Brief at 3. The United States is simply trying to have it both ways.

The District Court below certainly did not treat the *Gingles* preconditions as a preliminary matter, but as near conclusive proof of vote dilution. *See* App. 39a. Similarly, other Circuits have held that it will only be in a most unusual case where satisfaction of the preconditions does not result in liability. *See, e.g., Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1123 (3d Cir.1993); *Teague v. Attala County*, 92 F.3d 283, 293 (5th Cir. 1996). In fact, in three of the four Court of Appeals decisions the United States cites in its brief hold that the preconditions themselves all but establish liability. *See Sanchez v. Colorado*, 97 F.3d 1303, 1310 (10th Cir. 1996) (preconditions create an inference of discrimination); *Goosby*, 180 F.3d at 502-03 (accord); *Uno*, 72 F.3d at 983 (second and third *Gingles* preconditions

constitute the "surest indication of race-conscious politics" – citation omitted); *cf., Nipper v. Smith*, 39 F.3d 1494, 1514 (11th Cir. 1994) (it may be true that preconditions almost always coincide with liability, but court should consider totality of the circumstances), *citing Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994).

The protections afforded by Section 2 extend only to those defeats experienced by minority voters "on account of race or color." *LULAC*, 999 F.2d at 850. Because courts essentially fix liability based on the *Gingles* preconditions, Section 2 requires that plaintiffs establish white bloc voting that is "legally significant," and which occurred "on account of race." *See id.* at 850-61; *see also Clarke*, 40 F.3d at 813-14. Therefore, it is necessary that the court consider non-racial causes for white bloc voting in context of the *Gingles* preconditions.

II. THE INSTANT CASE PROPERLY PRESENTS THE CAUSATION ISSUE

In its Petition, the County further demonstrated that under *LULAC*, it is the plaintiff in a Section 2 case (here, the United States and the Private Respondents) that bears the burden of negating partisanship as the cause of differences in the voting behavior of blacks and whites. The reason is that the plaintiff bears the burden of proving the existence of the *Gingles* preconditions, and, absent proof that such differences are "on account of race," 42 U.S.C. § 1973, plaintiff has not met that burden.

The United States argues that "[t]he question whether causation is properly considered in the Section 2 analysis as an aspect of the totality of the circumstances, or whether instead it should be viewed as evidence bearing on whether the *Gingles* preconditions have been proven, is not presented

by this case." *Id.* at 13. The United States reasons that both courts below rejected the County's argument that differences in black and white voting behavior resulted from partisanship, not race, and that, consequently, "the stage of the analysis at which partisan causation is considered does not matter in this case ...." *Id.* at 14.

The flaw in these arguments is the same as the flaw in the reasoning of the courts below. Like the lower courts, *see* App. 10a-11a, 20a-22a; App. 83a-97a, Respondents improperly place the burden of proof on the County. Thus, the United States claims that Petitioners "failed to carry [the] burden" of "demonstrat[ing] that partisanship differences (or some other race-neutral factor) better explain voting patterns than does race." U.S. Brief at 14; *see also* Priv. Resp. Brief at 10 ("the County's evidence . . . failed to show that partisanship, rather than race, was the cause of white bloc voting"). The United States goes on to argue that the conclusions of the lower courts that "that petitioners were unable to show" that partisanship, rather than race, caused the losses of minority-preferred candidates "is sufficient to resolve the case." *Id.* at 16. However, consistent with *LULAC*, it was the Respondents' burden to negate partisanship, not the County's burden to prove it. *See* 999 F.2d at 859-61. Thus, the court below erred in assigning the County this burden of proof.

Moreover, the fact that the courts below could not separate the partisan causes of white bloc voting patterns from any alleged racial ones is a fact that favors the County, not the Respondents. *See LULAC*, 999 F.2d at 855 (race must be shown to be the "the predominant determinant of political preference"); *see also* S. Rep. No. 417, 97th Cong., 2nd Sess., *reprinted in* 1982 U.S.C.C.A.N. 177, 211. The Court of Appeals found that partisanship and race were hopelessly intertwined, App. 20a, but ultimately held only

that race still appears to "play a role" in voting patterns in Charleston County." App. 22a. Similarly, the District Court expressed severe doubts whether it could ever be proven whether race or partisanship was the predominant cause of white bloc voting. The Court rejected the possibility that the parties could "adequately identify a singular or even dominant cause of a community's corporate voting behavior." App. 88a. The Court could not determine whether voting causation in this case was driven by race or ideology, or some combination of both. *See id.* at 92.

As Respondents had the burden of negating partisanship, and because neither of the courts below indicated that Respondents met their burden of proving that race was the predominant reason for white bloc voting, Respondents' argument that they negated partisanship has no merit.

Moreover, while Petitioners do not seek review of the factual findings below, they do point out that Respondents have in several instances inaccurately summarized the record with respect to evidence that would demonstrate partisanship, rather than race, was the reason for white bloc voting. These include the following:

- Both Respondents misrepresent black electoral success in Charleston County. Private Respondents allege the complete exclusion of black candidates from the nine-member County Council during the 1990s. See Priv. Resp. Brief at 3. The United States is somewhat more charitable, alleging the presence of only one minority on the County Council since 1990. U.S. Brief at 5. Both Respondents misstate the record. Lonnie Hamilton, a black democrat, was re-elected to the County Council in 1990 and served to 1994. See App. 42a n.13. Timothy Scott, a black Republican, was elected to the County

Council in 1995, and has served there ever since. See App. 191a-193a.

- The Respondents also fail to describe accurately the degree of minority success in winning elections to the Charleston County School Board. The United States relies on the report of its expert, Dr. Arrington, to argue extreme racial polarization in County School Board elections. However, this report shows that between 1984 and 2000, fully half of the minority-preferred candidates running for the School Board were elected, and that by the year 2000, a majority of the school board was comprised of blacks. *See* Arrington Report Tables 14 and 15, Trial Record ("T.R.") at 1017-18, reproduced at Reply App. 1a-2a; *see also* App. 67a.

- The United States also grossly understates the degree of "decreased minority support" for two Republican candidates for the County Council after they switched from the Democratic party. U.S. Brief at 15. Actually, these candidates each received over 90 percent of the black vote when running as a Democrat but less than 5 percent when running as a Republican.

- Private Respondents cite the testimony of Tim Scott to suggest that "partisanship was not part of [his] election." *See* Priv. Resp. Brief at 4, 9. Actually, Mr. Scott was only making the point that he tried to get people to vote for him, not his party. *See* T.R. at 699, Trial Transcript ("Tr.") at 2368, reproduced at Reply App. 3a. However, at the same time, Private Respondents attack the Republicans for making "special and 'unprecedented' efforts to insure that [Scott] was elected." *See* Priv. Resp. Brief at 4.

Private Respondents cannot have it both ways. They cannot deny that Scott's election was the result of partisanship when they also argue it was result of extensive partisan Republican efforts.

- The United States falsely argues that the County's experts simply failed to collect partisanship data. Citing the trial record, they argue that the County's experts "conceded that they could have, but did not, collect the necessary data to measure for partisanship, and therefore they could not perform causal analyses isolating the effects of partisanship on voting behavior." *See* U.S. Brief at 14. However, this simply misrepresents the record. In one of the cited excerpts, the County's expert, Dr. Weber, explains that the data was simply not available because plaintiffs brought their complaint too long after the most recent election. See T.R. at 646-47, Tr. 2060-61, reproduced at Reply App. 4a-5a. Two of the other excerpts the United States cites, Tr. 2904-2905, 2908-2909, are not found in the record on appeal.

In short, Respondents have failed to describe the evidence accurately and have failed (like the courts below) to allocate the burden of proof properly. Accordingly, the judgments below should not be permitted to stand.

III. PRIVATE RESPONDENTS CANNOT ARGUE REJECTED CLAIMS OF INTENTIONAL DISCRIMINATION

The vast majority of Private Respondents' brief is dedicated to alleging intentional discrimination dating back from 35 to 50 years ago. *See* Priv. Resp. Brief at 5-8, 14-16. Private Respondents argue that because there was allegedly intentional discrimination 35 to 50 years ago, there must be

vote dilution today. However, these very same allegations of intentional discrimination were rejected by the District Court below, *see* App. 97a-101a. The Fourth Circuit did not reverse on this issue, *see* App. 10a, and Private Respondents have chosen not to appeal. As such, these arguments are not properly before the Court, and they should be disregarded. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994).

CONCLUSION

For the foregoing reasons as well as those set forth in the petition, the County respectfully requests that this Court grant the petition for certiorari and reverse the judgment below.

Dated: November 8, 2004 Respectfully submitted,

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APPENDIX

Table 14
Vote of Black Voters and White Voters for Preferred Candidate of Black Voters for School Board 1984-2000 for Single-Seat Election Contests

Year	District Name or Number A Shown on Returns	% of Black Votes for Preferred Candidate (cohesion)	% of White Votes for Preferred Candidate by Blacks	Race of Candidate Preferred by Black Voters	Was Candidate Peferred by Blacks Defeated?
1984	3	89%	26%	Black	Yes
1986	1	99	28	Black	Yes
1986	3	92	26	Black	Yes
1986	4	60	54	White	No
1988	1	82	26	Black	Yes
1990	2	56	66	White	No
1990	4	68	8	Black	Yes
1992	City	53	38	White	Yes
1994	10	76	77	Black	No
1994	11	63	59	White	No
1994	12	89	38	Black	Yes
1994	13	76	45	White	No
1996	1	47	30	White	Yes
1998	1	71	22	Black	No
1998	2	61	8	Black	No
1998	3	67	39	Black	No
1998	4	98	32	Black	No
2000	4	73	40	White	Yes

Table 15
Vote of Black Voters and White Voters for Preferred Candidate of Black Voters for School Board 1984-2000 for Double-Seat Election Contests

Year	District Name or Number A Shown on Returns	% of Black Votes for Preferred Candidate (cohesion)	% of White Votes for Preferred Candidate by Blacks	Race of Candidate Preferred by Black Voters	Was Candidate Peferred by Blacks Defeated?
1984	1	67% 21	38% 26	Black White	No Yes
1984	2	37 36	11 6	Black Black	Yes Yes
1988	2	52 21	18 31	Black White	Yes No
1992	North	45 35	28 42	Black White	No No
1992	West	44 22	16 26	Black White	Yes No
1996	2	30 22	22 33	White White	Yes No
1996	3	52 21	18 34	Black White	Yes No
2000	2	44 23	9 38	Black White	Yes No
2000	3	36 20	22 8	Black Black	No Yes

that correct?
A If partisanship was the only thing driving the rationale why those black -- the 31% of the blacks that voted for me voted for me because of partisanship?
Q No. Listen, I said if --
A I'm trying.
Q -- if partisanship were driving that election, you would not have gotten those Democratic black votes, would you?
A Oh, I see what you're saying now. No, you're wrong. I would have gotten those anyway. The reason I got the votes is because I went after the votes.
What partisanship does is it eliminates the opportunity to get many more of the votes. When you're running for a special election, if you're the only person on the ballot -- in spite of being a Republican, I had white Republicans voting for me.
Q Partisanship was not the only thing that was working for you, because you got a number of black Democratic votes; isn't that a part of it?
A I would say that partisanship was not a part of the election. Any time you're on the ballot by yourself a lot of things come into play.
Q Now, the longer you stay in office, the more people know about you as an elected official; isn't that correct?
A That's correct.

and which candidates they voted for?
A You do it in two ways: You can do it through the recall
mechanism where you interview people after the election and
ask them for whom did they vote, having ascertained both
their race and party identification; but you can also conduct
exit polls.
Q Right.
A So you are basically working only with the pool of voters
that voted that day. And what you would collect in that is
the race of the voter as well as the party identification.
Q And in those interviews, whether they're done as exit
polls or whether they're done as subsequent interviews
sometime after the election, you can -- you can ask the voter
why they voted for a Democrat or why they voted for a
Republican, correct?
A Yes.
Q And in reaching your opinion in this case that
partisanship is a better explanation than race, isn't it true
that prior to filing your initial, supplemental, and rebuttal
reports, you did not do this type of survey work?
A I believe there was no such data available to any of the
experts in this case.
Q And isn't it -- well, you were the expert that is saying
that partisanship is a better explanation than race, aren't
you, sir?

A Right, right, right, right.
Q And my question to you, again, is: In reaching that opinion, isn't it true that you did not do that type of survey work?
A I did not do that survey work, and I was not aware that anyone else had done that survey work, say, at the time of the '98 election or the 2000 election.
So Dr. Arrington, Dr. Ruoff, and I could not engage in that analysis because no such data exists.
Q And you did not conduct survey work to do interviews with voters at the time of your initial report, your supplemental report, or your rebuttal report to -- to ask voters interview questions pertaining to partisanship or race, did you, sir?
A No.
And the County could not have done that, because you did not file this case until early 2001, so that's too far away from the 2000 election, and it's very far away from the 1998 election, sir.
So it would be a very -- I would never advise any client to spend the money to engage in that kind of survey research because you simply wouldn't get good answers from the respondents because it's too far from the event and the recollection will have been poisoned, in effect, by lots of other things.
Q When were you retained?